Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, ET AL.,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION AND FORD MOTOR COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAMUEL ISSACHAROFF
435 West 116th St.
New York, NY 10027
(212) 854-2527

ELIZABETH J. CABRASER
JONATHAN D. SELBIN
LISA J. LEEBOVE
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

DON BARRETT
CHARLES F. BARRETT
BARRETT LAW OFFICE, P.A.
404 Court Square North
Lexington, MS 39095
(662) 834-2376

PETER J. RUBIN
Counsel of Record
Georgetown Univ. Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9388

DAVID BOIES
STEPHEN R. NEUWIRTH
CYNTHIA M. MOORE
BOIES, SCHILLER & FLEXNER, LLP
570 Lexington Ave., 16th Floor
New York, NY 10022
(212) 446-2300

IRWIN LEVIN
RICHARD SHEVITZ
COHEN & MALAD, LLP
136 N. Delaware St., Suite 300
Indianapolis, IN 46204-2538
(317) 636-6481

— see inside cover for additional counsel —

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

KEITH M. FLEISCHMAN
ELIZABETH A. BERNEY
DANIEL ALTMAN
MILBERG, WEISS, BERSHAD, HYNES & LERACH LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

QUESTIONS PRESENTED

1. Can the Seventh Circuit's holding under Fed. R. Civ. P. 23(b)(3) that "no class action is proper unless all litigants are covered by the same legal rules," which conflicts with the law of the Third, Fifth, Ninth and D.C. Circuits, and would eliminate the possibility of nationwide class actions where choice of law rules dictate application of the law of multiple states, be squared with the plain language of the Rule, which permits class actions when "questions of law or fact common to the members of the class predominate over any question affecting only individual members"?

2. May a federal court, consistent with the principles of federalism and *Erie v. Tompkins*, 304 U.S. 64 (1938), impose a tort-only theory of recovery of its own devising to supplant well-established state law causes of action asserted by plaintiffs for breach of warranty, consumer protection and unjust enrichment?

3. Can the Court of Appeals' determination that, under Fed. R. Civ. P. 23(b)(3), refusal to certify a class would be "superior" to certification because plaintiffs would be unable to proceed with their small value claims on an individual basis be squared with this Court's teaching in *Amchem Products v. Windsor*, 521 U.S. 591, 617 (1997) – or with the decisions of the other Courts of Appeals consistent with it – that Rule 23(b)(3) class actions are particularly appropriate where individual plaintiffs' recoveries would be small rendering individual prosecutions infeasible?

4. Is the Seventh Circuit correct in interpreting "efficient adjudication" under Rule 23(b)(3) to require "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," even for small value economic claims where such costly trials will likely never take place, in order to create a "market" of judgments so that an "accurate" settlement value for other claims may be established, or does "efficient," as this Court and other Courts of Appeals have long held, refer to the conservation of judicial resources and the avoidance of duplicative litigation?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are 229 individual purchasers or lessees of certain Ford Explorers or Firestone tires. A list of their names is included at Appendix F, Pet. App. 82a. In this action, Petitioners sought certification of, and the district court certified, two nationwide classes of such purchasers or lessees defined as:

> All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 . . . or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 . . . .

Pet. App. 73a. And:

> All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as [these] tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar to [these] tires.

Pet. App. 73a-74a.

Respondents are Bridgestone Corp., its wholly owned subsidiary Bridgestone/Firestone, Inc., and the Ford Motor Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 288 F. 3d 1012 (7th Cir. 2002), and is reprinted as Appendix A, Pet. App. 1a-13a. The opinion and order of the United States District Court for the Southern District of Indiana granting Petitioners' motion for class certification are reported at 205 F.R.D. 503 (S.D. Ind. 2001). The opinion is reprinted as Appendix B, Pet. App.14a-71a; the order is reprinted as Appendix C, Pet App. 72a-75a. The order of the Seventh Circuit denying Petitioners' timely petition for rehearing is unreported and is reprinted as Appendix D, Pet. App. 76a-77a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 2, 2002. A timely petition for rehearing was denied on June 5, 2002. Pet. App. 76a. On August 13, 2002, Justice Stevens extended the time for filing this petition for certiorari through and including October 3, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The relevant portions of Federal Rule of Civil Procedure 23 are reprinted as Appendix G, Pet. App. 86a-87a.

INTRODUCTION

This case presents a uniquely compelling opportunity to instruct the divided lower courts on the appropriate use of Rule 23 in the litigation context. Three times in the past six years, this Court has reviewed the parameters of Rule 23 in the context of settlement. See *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *Amchem Products v. Windsor*, 521 U.S. 591 (1997); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In doing so, the Court has expressly reemphasized the importance and presumptive propriety of the litigation class action in settings, such as consumer litigation, where prosecution absent the aggregation offered by Rule 23 would render the substantive claims unenforceable. The instant case

is the most high profile consumer case to reach the courts in many years and the opinion of the Court below would render ineffectual this Court's careful attempts to preserve the utility of the small-value class action.

STATEMENT OF THE CASE

This litigation arises from the highly publicized failures of defective tires and automobiles produced by Respondents Bridgestone/Firestone, Inc., Bridgestone Corporation, and Ford Motor Company. The gravamen of the complaint is that Respondents intentionally concealed uniform inherent defects designed into millions of Firestone tires and Ford Explorers. These widely-publicized defects have caused hundreds of deaths and thousands of personal injuries among consumers and have resulted in the aggregate in enormous economic loss to purchasers.

This case involves certification of a class action to assert economic loss claims occasioned by the sale of defective tires and vehicles that Respondents knew to be inherently unsafe and therefore not worth what consumers paid for them. These claims are based upon well-established and long-recognized state law causes of action for breach of warranty, consumer protection and unjust enrichment. The classes expressly exclude all claims for personal injury or death by those who suffered the most grievous misfortune from their purchase. Instead, the classes are limited to consumers who paid too much for the tires and vehicles with these concealed defects and who were and are put at risk of death or serious injury from the products unless they pay to replace them at their own cost.[1]

A. Following a series of serious accidents involving Firestone tires and Ford Explorers, a large number of

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[1]These classes include purchasers whose tires were never recalled or replaced by either NHTSA or Respondents. Respondent Ford has never recalled or replaced any of the Ford Explorers at issue.

consumer class actions were brought against Respondents in federal courts in multiple jurisdictions around the United States. These were transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Southern District of Indiana. See 28 U.S.C. §1407.

Following transfer, plaintiffs in all these consumer class actions filed the Master Complaint in the instant action in the MDL district court. The complaint alleges that certain Firestone tires share a uniform design defect that results in an unreasonably dangerous propensity to suffer tread separation at normal driving speeds, and that certain Ford Explorers share a uniform design defect that results in an unreasonably dangerous propensity to roll over under foreseeable driving conditions.

The fundamental design and manufacturing process of all the tires at issue originated with models developed as original equipment for the Explorer by Respondent Bridgestone/Firestone, Inc. ("Firestone") and its parent, Respondent Bridgestone Corporation ("Bridgestone"), pursuant to the specifications of Respondent the Ford Motor Company ("Ford"). The complaint alleges that Respondents collaborated on a tire design that was insufficiently "robust" to perform safely. The complaint further alleges that, in order to compensate for the stability defects in the Explorer, Respondents agreed to lower the recommended tire pressure on the original equipment Firestones from the 35-psi recommended by Firestone to 26-psi. This further increased the inherent risk of tread separation and other catastrophic tire failures but failed to eliminate rollovers.

In preliminary proceedings the district court dismissed Petitioners' tort claims, as well as certain individual claims for property damage, see *In re Bridgestone/Firestone, Inc.*, 155 F. Supp. 1069 (S.D. Ind. 2001), and deemed claims for injunctive relief pre-empted by the federal statute authorizing action by the National Highway Traffic Safety Administration (NHTSA). See *In re Bridgestone/Firestone, Inc.* 153 F. Supp.

935, 938, 943-948 (S.D. Ind. 2001).

The common theory of the surviving warranty, consumer protection and unjust enrichment claims is that the tires and Explorers were defective at the time of sale, that Respondents uniformly concealed these defects, and that – because the products were not what they were supposed to be – their purchasers were economically injured at the instant when they purchased them. These are the only claims whose viability as a class action are at issue on appeal. As the district court recognized, Pet. App. 66a n. 44, these consumer transaction claims each have such small value that they would likely not be brought as individual actions because the costs of litigation would exceed the expected recovery. Individually, they are what courts have termed "negative value" claims.[2]

The district court also determined that, under Indiana choice of law rules,[3] the law of Michigan, where Respondent Ford has its principal place of business and made all decisions relevant to Petitioners' claims, applied to the claims against Ford, and that the law of Tennessee, where Respondent Firestone has its principal place of business and made all decisions relevant to Petitioners' claims, applied to the claims against Firestone and Bridgestone. 155 F. Supp. at 1078-1086; see also Pet. App. 15a-24a (reaffirming this ruling).

In the decision at issue here, the district court certified, under Fed. R. Civ. P. 23(a) and (b)(3), a class of purchasers or

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[2]"Negative value claims are claims in which the costs of enforcement in an individual action would exceed the expected individual recovery." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 348 (N.D. Ohio 2001).

[3]Because all class claims were refiled in Indiana in a Master Complaint, only Indiana choice of law rules were at issue. It is well-settled that a federal court hearing state law causes of action must use the choice of law rules of the state in which it sits. See *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); see also *In re Bridgestone/Firestone, Inc.*, 155 F. Supp. at 1078.

lessees of 1991 to 2001 model year Ford Explorers and a class of purchasers or lessees of vehicles equipped with Firestone tires sold under six trade names.[4] It also certified six carefully crafted subclasses of the "Tire Class," and one subclass of the "Explorer Class" under Fed. R. Civ. P. 23(c)(4).[5] It subsequently issued its opinion explaining its decision to certify these classes.

First, the district court found the requirements of Rule 23(a) easily satisfied,[6] noting that "[t]he briefing of the parties reveals that there are no real disputes among them as to [Petitioners'] ability to make these showings," Pet. App. 34a n. 16. See Pet. App. 34a-38a.

It then turned to Rule 23(b)(3) which required the court to "find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

1. a. In determining predominance, the district court found that "defect" – the issue upon which all the remaining claims before the court would turn – "can be demonstrated (or disproved) with common proof." Pet. App. 40a-44a. Reviewing an extensive factual and technical record, the court

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[4]The definition of the "Explorer Class" and the "Tire Class," which are reprinted in relevant part *supra* at ii, can be found in full at Pet. App. 73a-74a.

[5]The "Explorer Sub-class" is defined at Pet. App. 73a. The six Tire Sub-Classes are defined in paragraphs 1-6 of Plaintiffs' Class Structure/Class Definitions, Appendix E, Pet. App. 79a-81a, incorporated by the district court by reference in its order granting class certification. See Pet App. 74a n. 2.

[6]Rule 23(a) is reprinted at Pet. App. 86a. In order for a class action to be certified, the party seeking certification must meet the requirements of Rule 23(a) and those of one of Rule 23(b)(1), (b)(2) or (b)(3). See Fed. R. Civ. P. 23(b).

found that the tires at issue were similar in all relevant respects, rejecting Respondents' contention that Petitioners' claims involved "over 280 distinct tire populations." Id. 41a. The district court found "persuasive evidence that Firestone has significantly exaggerated distinctions among the Tires." Id. 41a. The court credited testimony about common components in the tires Petitioners claim are defective, and testimony undermining Respondents' claims that differences among the tires are significant. Id. 41a-42a. The district court also found Ford's argument that the Explorers at issue differed "not persuasive," noting that, for example, all the relevant Explorer models and years were treated "the same for many purposes" by Respondent Ford itself. Id. 42a-43a.

b. As to other common issues, the court examined carefully each claim in turn.

i. On Consumer Protection, the court concluded that because common evidence would be used to show common representations and omissions by Ford and common omissions by Firestone, common issues predominated. See Id. 45a-51a.

ii. On Express Warranty, the court found that the relevant language in all the Firestone warranties (with the possible exception of a "commercial use" exclusion) was identical, and that its breach – upon sale of the tires, not upon their failure – would be shown by classwide proof. Id. 52a-53a. The court also found the relevant language in all the Explorer warranties identical. Id. 53a. It concluded that "[t]hese common issues predominate the Plaintiffs' claims for breach of express written warranties." Id.

The district court refused, however, to certify claims for breach of express warranty created by advertising because such claims would require proof of each plaintiff's exposure to Respondents' advertising. Id. 56a-58a. Similarly, the district court refused to certify "express warranty claims based upon oral representations made to them at the time of sale." Id. 58a.

iii. On Implied Warranty, the court concluded that the common question of defect predominated with respect to any determination about breach of the implied warranty of merchantability. Id. 58a. The court recognized that the question of privity, relevant only to the claims against Firestone under Tennessee law, would not be uniform for all plaintiffs. It concluded, though, that "the[] types of sellers also can be divided into discrete subclasses based upon the sellers' relationship, if any, with Firestone." Id. 60a. It concluded that differences with respect to privity did not defeat predominance of common issues.

iv. On Unjust Enrichment, the court concluded that the common issues – defect and whether Respondents were unjustly enriched – predominated. The court, recognizing that plaintiffs' claims are for the excess amounts received by the Respondents at the time of sale, rejected the idea that proof of an individual vehicle's resale value, which is not at issue in this case, defeated predominance. The court recognized that each plaintiff's compensation would depend only on "evidence of when and from whom each Plaintiff purchased the vehicle or tires" since the relevant question was the wholesale price received by the defendants, precluding a need for examination of the price paid by each consumer. The court held that "those straightforward factual questions are not the type of individual issues that defeat a finding of predominance." Id. 61a-62a.

v. Finally, the court denied certification of a subclass of property damage claims, finding that common issues would not predominate for these claims. Id. 63a.

2. In determining superiority, the court examined in turn the four factors explicitly identified by the Rule as "pertinent:"[7]

First, it found – unsurprisingly given the small value of

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[7]See Fed. R. Civ. P. 23(b)(3).

each claim – that no actions alleging these harms had been brought by individual plaintiffs. Consequently "the interest of members of the class in individually controlling the prosecution or defense of separate actions," Fed. R. Civ. P. 23(b)(3), did not counsel against certification. Pet. App. 64a.

The court concluded that MDL consolidation "militate[d] in favor of certification." Id. And, it concluded that absent certification, "if individual Plaintiffs wish to continue pursuing their claims, either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. Such a result would be immensely burdensome to the courts, parties, and witnesses." Id. 66a (footnote and citation omitted). Relying on this Court's teaching in *Amchem* that class actions are designed to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," the court also noted that, because of their small value and the high cost of litigation, absent certification, "most Plaintiffs would drop their claims." Id. 62a n. 44 (citing *Amchem*, 521 U.S. at 617).

Finally, the court concluded that the trial envisioned by Petitioners was manageable:

> [T]he individual issues in this case are not nearly as daunting as [Respondents] claim. . . . Most of the distinctions to which [Respondents] refer are completely immaterial and therefore will not create the need for subclasses. As noted above, legally relevant distinctions . . . can be managed through subclassing, a procedure that commends itself in practical terms and is specifically authorized by Rule 23(c)(4)(B).

Id. 66a-67a.

Respondents argued that there were what they described as "superior" methods for resolving these cases, but the district court rejected the two they proposed. First, it concluded that "MDL treatment" – which applies only to pretrial proceedings,

see 28 U.S.C. §1407(a) – "can take a dispute only so far." Id. 69a. Next, it rejected the idea that the NHTSA process for investigating and remedying consumer complaints would be a "superior method for the fair and efficient adjudication of the controversy." See Fed. R. Civ. P. 23(b)(3): "While we recognize the role that NHTSA plays in promoting highway safety, we also are aware that the remedies available to NHTSA are not the same as those available through the judicial process. Courts should not cede their proper role to an administrative agency." Pet. App. 70a (citation omitted).

B. The United States Court of Appeals for the Seventh Circuit granted Respondents' Rule 23(f) petitions for interlocutory appeal and, in an opinion by Judge Easterbrook, reversed. Id.1a-13a.

The Court of Appeals concluded that class certification under Rule 23(b)(3) was improper because there could be no "finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" Id. 10a-11a (citing Fed. R. Civ. P. 23(b)(3)).

1. The Court first asserted categorically, despite the plain language of Rule 23, that "[n]o class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3)." Id. 3a.

The Court concluded, contrary to the district court, that Indiana choice of law rules would apply the law of each state in which the vehicles and tires had been acquired, not the law of the defendants' home states, to warranty, consumer protection and unjust enrichment claims. Id. 4a-9a.

Rather than engaging in an independent reassessment of whether common questions of law or fact still predominated, because, for example, of the similarity of various applicable

states' laws or remanding to permit the district court to engage in such a reassessment in the first instance – the approach taken by several other Circuits – the Seventh Circuit held: "Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." Id. 9a.

2. In a remarkably bald piece of dictum, the Court also asserted that statewide classes – something not at issue in this appeal – also could not be certified. See id. ("Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, we add that this litigation is not manageable as a class action even on a statewide basis.") Without reference to the fact-finding below, the Court listed a number of purported differences among Explorers, including whether vehicles had been resold, and whether they had been driven off road, differences "affect[ing] resale price." Id. 9a-10a. It also claimed to find differences among the Firestone tires that it thought were relevant to Petitioners' claims, concluding that "the [differences] we have mentioned preclude any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.' Fed. R. Civ. P. 23(b)(3)." Id. 10a-11a. With respect to the tire class, the Court said that because of the purported differences between tires "it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform." Id. at 11a

This assessment was apparently based on a misunderstanding of Petitioners' claims, the elements of which, again, the Court did not examine. Indeed, most of the differences listed, as the district court found, bear no relationship to the Petitioners' causes of action. For example, the Court said, "Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to

underinflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may have been higher in Arizona than in Alaska." Id. 9a-10a. It also said, "The tire class includes many buyers who used Firestone tires on vehicles other than Ford Explorers, and who therefore were not advised to underinflate their tires." Id. at 10a.

Petitioners' claims, however, do not depend on how, or where, their Explorers or Firestone tires were used (including the level of tire inflation). These are not, for example, tort actions in which contributory negligence might be relevant. Petitioners present warranty, consumer protection and unjust enrichment theories, none of which requires a showing that a particular tire failed or turns in any respect on how it was used, but only that the Explorers and the tires each suffered from common, uniform defects at the time of sale and thus were not worth what consumers paid for them.

Similarly, the Court's discussion of other, extrinsic facts bearing on resale value of the Explorers, as the district court properly recognized, have no relevance to Petitioners' claims that the tires and vehicles were inherently defective and hence of compromised value when they were originally purchased.

3. As to superiority, the Court of Appeals took an unprecedented tack. The Rule requires that "a class action" be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court of Appeals, though, took issue with the very judgment of state lawmakers in providing state law causes of action for the failure to render the value promised when a manufacturer sells a defective product.

In the Court's view, the optimal "incentives" for manufacturers to take due care would instead be provided by a system that allowed recovery only to those suffering physical injury from the failure of defective products. Pet. App. 6a and n. 1. The Court concocted a hypothetical economic model to prove this, arguing that full recovery in

tort alone to all those injured or killed would "create[] both the right compensation and the right incentives." Id. at 6a n. 1.[8]

Consequently, and remarkably, the Court – recognizing that, because of their small value, these claims were unlikely to be brought except as part of a class action – concluded that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury" would be "far superior" to litigation by people it described as "uninjured buyers," "for dealing with consumer products that are said to be failure prone." Id. 11a. Rather than evaluating what method would most fairly and efficiently adjudicate the claims made by Petitioners against Respondents, the court crafted a rule of its own devising that, regardless of the recognition of economic loss consumer claims under state law, such claims ought not

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[8]The Court spun out its theory as follows:

> Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only $9,500 per widget–for the expected per-widget cost of injury is $500–and each buyer could have used the difference in price to purchase insurance (or to self-insure, bearing the risk in exchange for the lower price). On this theory the 990 uninjured buyers would collect a total of $495,000. The manufacturer's full outlay of $995,000 ($500,000 to the 10 injured buyers + $495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product's defect. This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system–$500 in damages to every buyer, or $50,000 in damages to every injured buyer–creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess precautions.

Id. 6a n. 1 (citations omitted).

to be adjudicated at all.

4. Finally, the Court concluded that the district court had misunderstood the nature of the "efficiency" that Rule 23(b)(3) is designed to implement.

Having listed some purported differences among Explorers and tires included in the certified classes, the court said that although the district judge understood that "differences within the class would lead to difficulties in managing the litigation," she had concluded that it would be more efficient "to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law." Id.

The Court, though, rejected the very premise of the district court's conclusion. Despite the fact that the district court looked at precisely the type of efficiency in allocation of judicial resources required by Rule 23, the Court of Appeals derided "the vision of 'efficiency'" employed by the district court as "the model of the central planner," rather luridly comparing the ordinary judicial task of determining whether a class should be certified under Rule 23 to the work of the defunct Soviet planning organ "Gosplan or another central planner." Id. "When courts think of efficiency, they should think of market models rather than central-planning models," the Court said. Id. 12a. A class action would, the Court concluded, be less "efficient" because it would "suppress information that is vital to accurate resolution." Id. 11a.

The Court's view of efficiency did not refer to the speed of resolution, the elimination of costs, the avoidance of duplication of effort, and the conservation of judicial resources, nor did it make reference to the very factors that Rule 23(b)(3) specifies are "pertinent" to the required finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." See Fed. R. Civ. P. 23(b)(3). Instead, the Court invoked a purported need for "diversified decisionmaking to supply and evaluate information" about the value of each claim and

concluded that "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," Pet. App. 12a (internal quotation marks and citation omitted), was preferable to the class action certified by the district court. It reached this conclusion despite the district court's finding that these were negative value claims such that this decentralized process would never, in fact, occur.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Determination that Rule 23(b)(3) Can Only Be Satisfied Where All the Plaintiffs are Subject to the Same Law Conflicts with the Decisions of the Third, Fifth, Ninth and D.C. Circuits and with the Plain Language of Rule 23(b)(3).

The Court below held that the requirements of Rule 23(b)(3) cannot be satisfied unless all plaintiffs are subject to the same law. In this, its decision conflicts with those of at least the Third, Fifth, Ninth and D.C. Circuits, as well as the plain language of the Rule. These other Circuits, when faced with motions for certification even of nationwide classes in which the law of different states will apply, have examined the variations among the laws of the different states to determine whether, in light of those variations, the requirements of the Rule "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are met. Fed. R. Civ. P. 23(b)(3).[9] In the

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[9]Indeed, not only does the plain language of the rule make clear that what must be shown is not uniformity, but only that "common questions of law or fact predominate," id., the very structure of the Rule reinforces this. Rule 23(c)(4) is specifically designed to address issues of manageability related to differences in, among other things, applicable law. "The Court can overcome difficulties created by variations in state law through the judicious use of subclasses." *Rivera v. Wyeth Ayerst Labs*, 197 F. R. D. 584, 591 (S.D. Tex. 2000).

non-personal injury context in particular, these courts have adhered to this Court's observation in *Amchem* that "predominance is a test readily met in certain cases alleging consumer or securities fraud . . . " 521 U.S. at 624.

Thus the Third Circuit, for example, has more than once upheld class certification of a nationwide class in non-personal injury, economic loss cases in which different state laws applied. See *In re Asbestos School Litigation*, 789 F. 2d 996, 1010 (3d Cir.), cert. denied, 479 U.S. 852 (1986); *In re Prudential Ins. Co of America Sales Litigation* ("*Prudential*"), 148 F. 3d 283 (3d Cir. 1998). In *In re Asbestos School Litigation*, certification under Rule 23(b)(3) was found appropriate where the plaintiffs had made a creditable showing that different state laws could be broken down into approximately four patterns. See *Georgine v. Amchem Products*, 83 F. 3d 610, 627 n. 13 (3d Cir. 1996), aff'd. sub nom. *Amchem v. Windsor*, 521 U.S. 591 (1997) (describing *In re Asbestos School Litigation).*

Similarly in *Prudential*, the court affirmed certification and held that predominance was "not defeated because the class claims are subject to the laws of the fifty states." 148 F. 3d at 315. The court said:

> Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. . . . In this instance [appellant] has failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach. . . . . The [district] court concluded that the "elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns." Id. The district court "considered the choice of law issues that confronted the Court and concluded that these choice of law issues [did] not render this class action unmanageable." Id. We agree.

Id. (citations and footnotes omitted).

The Ninth Circuit, too, has taken this approach and has found a nationwide class to meet the 23(b)(3) requirements for certification in a non-personal injury consumer case in which, just as in this one, different state laws applied:

> Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985). In this case . . . the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and "lemon laws." Individual claims based on personal injury or wrongful death were excluded from the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998). *Hanlon* squarely conflicts with the decision below.

The approach taken by these courts of examining the differences among the relevant state laws has been followed by other Circuits as well. Thus, the Fifth Circuit has held that the proper procedure where class certification is sought and different state laws will apply is to assess the way in which "variations in state law affect predominance and superiority." See, *e.g.*, *Castano v. American Tobacco Co.*, 84 F. 3d 734, 741 (5th Cir. 1996). That court has stated, "[p]rior to certification, the district court must determine whether variations in state law defeat predominance," id. at 750, and it has adopted the procedure followed by the Third Circuit in *In Re Asbestos School Litigation*. See id. at 742. The Court of Appeals here deprived the district court of the opportunity to conduct such an analysis.

Similarly, while sitting as a Circuit Judge on the D.C. Circuit, Justice Ginsburg jointly writing for that court held:

> A considered predomination determination by the District Court . . . must be made. As the Third Circuit observed in *In re Asbestos School Litigation*, to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an "extensive analysis" of state law variances, "that class certification does not present insuperable obstacles." . . . The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.

Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987) (internal quotation marks and citations omitted).[10]

The split between the Seventh Circuit and these other Courts of Appeals is real and requires resolution by this Court now. District courts in the Seventh Circuit are already applying the "uniformity" requirement created by the Court of Appeals in this case. Thus, for example, last month the District Court for the Northern District of Illinois denied certification of a nationwide class in reliance upon the decision below. It said in relevant part:

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[10]Indeed, this is the ordinary method for evaluating the propriety of class certification in these circumstances. See, *e.g.*, *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 956-57 (E.D. Tex., 2000) (recognizing that basic warranty law under the UCC is uniform and that "[f]or decades, courts have certified [national] product defect class actions"); *Duhaime v. John Hancock Life Ins. Co*, 177 F.R.D. 54, 64 (D. Mass. 1997) ("Insofar as the class members assert claims for fraud or misrepresentation under various state laws, the differences among these laws do not appear to be so great as to undermine the predominance of the common questions of law or fact.").

> Just recently, the Seventh Circuit has stated that "no class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R Civ P. 23(a), (b)(3)," *In re Bridgestone/Firestone, Inc.*, 288 F. 3d 1012, 1015 [Pet. App. 3a] (7th Cir. 2002). Differences in state law on theories presented in a putative class action have led the Seventh Circuit to hold that the actions may not proceed as a nationwide class. Id. Therefore, uniform law on invasion of privacy, intrusion into seclusion, and unjust enrichment is essential for certification of a requested nationwide class.

In re Trans Union Corp. Privacy Litig., 2002 U.S. Dist. LEXIS 17209, at *40 (N.D. Ill. September 10, 2002). Indeed, lower courts in other jurisdictions, too, are already citing the rule announced below in denying class certification. See, *e.g.*, *In re Rezulin Products Liability Litigation*, 2002 U.S. Dist. LEXIS 17204, at *37 (S.D.N.Y. September 12, 2002) (denying class certification by holding that "'[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a nationwide class action is not manageable'") (quoting the decision below, Pet. App. 9a).

Finally, this case presents an appropriate vehicle for addressing this split because, having concluded that the laws of the class members' states would apply to Petitioners' claims, the court below neither engaged in the analysis of the variations among those laws that is required by Rule 23(b)(3), nor remanded for consideration of that problem by the district court in the first instance. Cf. *Castano*, 741-744 (explaining the extensive analysis of state law variations that the district court must undertake).[11]

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[11] Indeed, although it is unnecessary to the certiorari calculus, had the court below undertaken the proper analysis here, it would have concluded that certification is proper. In the district court Petitioners introduced

B. The Court's Conclusion that Litigation of Tort Claims By Third Parties and Regulation by NHTSA Would Be "Superior" to Permitting Plaintiffs to Proceed With Their Non-Tort State Law Causes of Action Usurps the States' Lawmaking Power in Violation of the Fundamental Principle of Federalism Announced in *Erie v. Tompkins*.

The Court's superiority analysis departs from the text of Rule 23, its underlying purposes, and its interpretation by the other Courts of Appeals.

By its terms Rule 23 requires a finding "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court here found, however, in light of its theory that actions for warranty, consumer protection or unjust

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extensive evidence, ignored by the Court of Appeals, demonstrating that the laws of the fifty states with respect to warranty, consumer protection and unjust enrichment are essentially identical with regard to the issues relevant in this case. For the Court's convenience, that evidence is reprinted as Appendix H, Pet. App. 88a-156a.

Nor is it significant that the Court below also found a series of purported factual differences among the relevant Explorers or tires. As described above, most of these purported factual differences were simply irrelevant to Petitioners' claims. Part of the Court of Appeals' failure to undertake the examination required by the Rule, and by the decisions of other Circuits, was that it did not even bother to examine the elements of the asserted causes of action in order to determine the relevance of the claimed factual differences. Further, to the extent the differences were listed because the Court thought they related to damages, see Pet. App. 9a-10a, "the Advisory Committee Notes expressly state" – and courts have ordinarily found, see, e.g., *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F. 3d 124, 139-140 (2d Cir. 2001), cert. denied, 122 S. Ct. 2382 (2002) – "that . . . needed proof of damages will not preclude a finding of predominance." 1 Newberg and Conte, *Newberg on Class Actions*, 4-91-4-92. And, in any event, as the district court found but the Court of Appeals failed to consider, even relevant factual differences may be dealt with by the subclassing procedure set out in Fed. R. Civ. P. 23(c)(4). See also id. at 4-91-4-97 (describing procedures for resolving individual damages issues).

enrichment "mean excess compensation," Pet. App. 6a, that "Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone." Id. 11a.

The Court of Appeals' approach turns Rule 23's superiority requirement on its head. To begin with, it presupposes that federal courts have been authorized by the Rule to determine whether adjudication of claims recognized by state law – here the consumer claims raised by Petitioners – would be "superior" to their *non*-adjudication, rather than whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(a). As this Court has long recognized, Rule 23 is not about whether claims should proceed, but about how.[12] Nor, of course, as Justice Thomas wrote for the Court just last Term, is a federal court free to bend the Rules of Civil Procedure because of its views about the merits of one or another cause of action.[13]

In its approach, the Seventh Circuit has not only flouted the very language of the Rule, it has accreted to itself in violation of fundamental principles of federalism the power to judge the wisdom of state lawmakers in creating various causes of action.

The Court hypothesized an economic model of law under

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[12]See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (Rule 23 does not give courts "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

[13] See *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 999 (2002) (courts are not free to ignore Fed. R. Civ. P. 8(a) and impose a heightened pleading requirement in employment discrimination cases even to weed out "unsubstantiated suits"; any different result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (internal quotation marks and citation omitted).

which warranty, consumer protection and unjust enrichment claims would, in the face of the availability of tort recovery for those suffering physical injury or death from defective products, "overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects." See Pet. App. 6a and n. 1. It then posited that "most states" would follow its "tort only" approach because "tort law fully compensates those who are physically injured, [so] any recoveries by those whose products function properly mean excess compensation." Id. 7a.

That is obviously wrong. Whatever the merits of the Court's theoretical approach, it decidedly does not describe the law of *any* state.

To give just the most obvious example, there is no state in the Union that would deny consumers a contractual claim for breach of warranty because of the absence of physical harm. To the contrary, under § 2-314 of the Uniform Commercial Code, a consumer may recover under an implied warranty of merchantability if goods prove not "fit for the ordinary purposes for which such goods are used." See UCC §2-314 ("Implied Warranty: Usage of Trade"). *Every* state in the Union has adopted Article 2 of the UCC, with the sole exception of Louisiana, which has adopted the same protections statutorily. *See* La. Civ. Code Ann. art §§ 2524, 2475. Nor do state consumer protection laws require an allegation of physical – as opposed to economic – injury.

For example, in overturning dismissal of "no-injury" consumer claims under Texas and Florida law, Fifth Circuit Judge Edith Jones recently reaffirmed the well-established nature of such recovery regardless of the existence of an allegation of physical harm:

> "[B]enefit of the bargain" is a standard method for measuring damages in fraudulent representation cases and certain contract cases. The benefit of the bargain measure of damages is neither novel nor exotic. A simple example . . . makes the common-sense nature

> of benefit of the bargain damages clear: if a man buys what is represented to him as an 18k gold ring, but later discovers that the ring is merely 10k gold, he is entitled to the difference between the 18k ring that he bargained for and the 10k ring that he received.

See, e.g., *Coghlan v. Wellcraft Marine Corporations*, 240 F.3d 449, 452 (5th Cir. 2001) (footnote omitted) (upholding benefit of bargain causes of action for uninjured purchasers of purportedly all-fiberglass boat actually made of wood encased in fiberglass).

Given this rather obvious feature of American law, it should come as little surprise that none of the cases cited by the Court of Appeals for the proposition that "most states would not entertain the sort of theory that plaintiffs press," supported that assertion, most of them being either tort cases or cases in which allegations or evidence were insufficient. Indeed, one of them explicitly asserted the *opposite* of the proposition for which the Seventh Circuit cited it.[14]

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[14]See *Ford Motor Co. v. Rice*, 726 So. 2d 626, 627, 631 (Ala. 1998) ("[T]his Court has often allowed a plaintiff to recover damages under a fraudulent-inducement theory for a purely economic loss to a product itself based upon value that is indicated by a seller's representations but not actually received, even where the product was in fact working properly."). The other Court of Appeals and highest state court decisions cited by the Court below, none of which makes the point for which they were cited, were: *Briehl v. General Motors Corp.*, 172 F.3d 623, 628-629 (8th Cir. 1999) (dismissing warranty claim for loss of resale value for failure adequately to allege damages where plaintiffs neither alleged that they had resold their vehicles nor by what amount they were damaged by the alleged defect); *Angus v. Shiley*, Inc., 989 F.2d 142, 147-48 (3d Cir. 1993) (refusing to recognize an action for infliction of emotional distress where no allegation of defect had been pleaded); *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (finding insufficient evidence of defect and suggesting in dictum that the court would have "serious concerns" about an action for fear that a defective product will fail); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir. 1989), cert. denied, 495 U.S. 910 (1990) (interpreting implied warranty of merchantability to hold that well-functioning GM diesel cars, said to

Nor, indeed, is there any substance to the economic model upon which the Seventh Circuit's dramatic recasting of state law rests. Were the model sound, the resale value of Explorers, for example, would have been unaffected by the wide publicity of the asserted defects. Under the model, potential buyers would have been indifferent about purchasing a potentially lethal vehicle since, should the product fail, they could expect recovery for injury or death through the tort system. As set forth in the Complaint, however, the real world treats dangerous products quite differently. The value of the vehicles dropped precisely because potential used car buyers are not indifferent between having a safe vehicle in which they will remain uninjured, and having a defective one in which they risk injury but with the expectation of a tort recovery.

More fundamentally, though, the Seventh Circuit's judgment about the wisdom of providing these causes of action is irrelevant. Whether state law in fact overdeters wrongdoing, whether Judge Easterbrook would consider it wise to permit warranty, unjust enrichment or consumer protection claims when state law already provides for recovery for injury in tort, it is incontrovertible that states *do* provide such causes of action for purchasers of defective products who have not (or not yet) been physically injured, to compensate them for their financial loss.

To permit the Court of Appeals to utilize the superiority requirement of Rule 23 to override the judgment of state lawmakers creating these causes of action, and, based upon its own assessment of their desirability, to prevent such suits from going forward, violates basic principles at the heart of our system of federalism. Indeed, it violates one of the most

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have lost resale value because of the "poor reputation" of diesel cars resulting from defects in other GM diesel cars, were "fit for the ordinary purposes for which" they were sold); and *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187,192 (Ky. 1994) (negligence claim in tort cannot be brought before the conduct causes injury that produces loss or damage).

fundamental of those principles, that announced in *Erie v. Tompkins*, 304 U.S. 64 (1938).

Erie held that under the Constitution there was no federal "power to declare substantive rules of common law applicable in a State." Id. at 78.

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Id. at 78-79 (internal quotation marks and citation omitted). As Justice Holmes said in language quoted in *Erie*, "the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." Id. at 79 (brackets in original).

In determining that it would be best if plaintiffs were unable to receive redress under causes of action recognized in state law, the Seventh Circuit has violated precisely the principle enshrined in *Erie*.[15] In doing so, the ruling below conflicts with all Circuits that have certified national consumer classes based on faithful renditions of the substantive laws of the States. See, *e.g.*, *Hanlon*, 150 F.3d 1011 (9th Cir. 1998); *In re Asbestos School Litigation*, 789 F.

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[15]It has also run afoul of the Magnuson-Moss Act, 15 U.S.C. §§ 2304(a) & 2308, on which jurisdiction in the district court was based, which specifically preserves state warranty law for actions brought into federal court. *See* S.Rep No. 151, 1st Sess. 21 (1973) ("It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code.").

2d 996 (3d Cir. 1986).

C. To Hold that Refusal to Certify is "Superior" Because it Will Not Permit Plaintiffs to Proceed with Their Small Value Claims Contravenes this Court's Teaching that the Primary Purpose of Rule 23(b)(3) is to Permit Aggregation and Prosecution of Such Claims and Conflicts with the Decisions of the Third, Fifth and Eleventh Circuits.

The Court's superiority analysis independently conflicts with the teaching of this Court and the decisions of the other Courts of Appeals because it uses the small value of each individual class member's claim as a basis for denying certification, rather than as the central reason for granting it.

The Court of Appeals concluded that a refusal to certify would be superior in this case because each class member's claim was so small in relation to the cost of litigation that, absent the class action device, these suits would not proceed. Having concluded that recovery in warranty, consumer protection or unjust enrichment would "overcompensate[] buyers and lead[] to excess precautions," Pet. App. 6a-7a n. 1, the Court held that "Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone." Id. 11a.

As this Court has stated: "The policy at the very core of the [23(b)(3)] class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem*, 521 U.S. at 617 (internal quotation marks and citation omitted).[16]

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[16]Indeed, as this Court has described, in the inquiry into the

Among other things, the Rule thus acts to ensure the "effective enforcement" of civil law. 1 Newberg and Conte, *Newberg on Class Actions* ("*Newberg*") 4-170 (3d ed. 1992). Thus, "if a comparative evaluation of other procedures reveals no other realistic probabilities, [the superiority requirement] of Rule 23(b)(3) is met." 7A Wright, Miller & Kane, Federal Practice and Procedure §1779 at 552 (2d ed. 1986).

The Seventh Circuit, though, took the small value of the claims, the fact that standing alone none of them "provide[s] the incentive for any individual to bring a solo action prosecuting his or her rights," *Amchem*, 521 U.S. at 617, and thus that they will likely not be litigated individually, as a basis for finding that a class action would *not* be superior to "other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

This conclusion conflicts with the approach taken, under this Court's instruction, by the other Circuit Courts of Appeals. The Third Circuit, for example, in upholding class certification, has found proper a superiority determination in which the district court "examined the relatively modest size of the individual claims in the aggregate, and concluded a class action presented the 'only rational avenue of redress for many class members.'" *Prudential*, 148 F. 3d at 316.

The Fifth Circuit has said "the most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit." *Allison v. Citgo Petroleum*, 151 F.3d 402, 420 (5th Cir. 1998); see also *Castano*, 84 F. 3d at 748 (same).

"nonexhaustive list of [four] factors," id. at 615, explicitly identified in the Rule as pertinent to the determination of predominance and superiority, the Advisory Committee anticipated that courts would consider the interests of the members of the class in controlling their own litigation. The archetypal case in which these interests would be, for "practical" purposes nonexistent, was one in which "the amounts at stake for individuals [are] so small that separate suits would be impracticable," Adv. Comm. Notes, 28 U.S.C., App. 698. See *Amchem*, 521 U.S. at 616.

Likewise the Eleventh Circuit has said that "the most compelling justification for a Rule 23(b)(3) class action" is "the possibility of negative value suits, see *Amchem*, 521 U.S. at 617." See *Rutstein v. Avis*, 211 F.3d 1228, 1241 (11th Cir. 2000), cert. denied, 532 U.S. 919 (2001). See also *Newberg* 4-166 n. 482 ("It seems settled that the Rule 23 policy in favor of providing a forum for small claimants is of primary importance in resolving the superiority issue."). As the leading treatise on class actions asserts, "when claims of class members are small . . . . a court will likely certify a class action as superior . . . because a class denial would result in no litigation at all." Id. at 4-163. The decision below "depart[s] from the unambiguous design of the superiority test by failing to analyze how the common claims of all class members can be adjudicated by a feasible method that is available as a practical matter." Id. at 4-108-4-109.

D. The Court's Conclusion About Efficiency Ignores the Language of the Rule, this Court's Teaching, and Conflicts with the Decisions of Other Circuits.

Finally, the court's approach to measuring the "efficien[cy]" with respect to which Rule 23(b)(3) requires class treatment to be superior conflicts with that of the other Courts of Appeals. "Efficient" as that word is used in the Rule refers to the efficient adjudication of the controversy at issue: It is about avoidance of duplication of effort, the conservation of judicial resources, the elimination of litigation costs, and the speedy resolution of the controversy. See, *e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F. 3d 768, 783 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("One of the paramount values in [class actions] is efficiency. Class certification enables courts to treat common claims together, obviating the need for repeated adjudications on the same issue."); see also, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting [every class member]

to be litigated in an economical fashion under Rule 23").

Here, by contrast, the Court of Appeals looked at efficiency as though that meant creation of a "market" in claims against Respondents, in which the settlement value of remaining claims could be assessed by reference to the range of judgments entered in already-adjudicated cases. See Pet. App. 12a. The Court of Appeals concluded that "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions," Pet. App. 12a (citing *In re Rhone-Poulenc Rorer, Inc.* ("*Rhone-Poulenc*"), 51 F. 3d 1293, 1299 (7th Cir.), cert. denied, 516 U.S. 867 (1995)), was preferable to the class action certified by the district court. In this, the Court purported to rely on *Rhone-Poulenc* in which Judge Posner concluded that class actions for mass tort claims, at least where (unlike in this case) a substantial number of high value individual suits have been found to lack merit, can force defendants to settle for more than the claims would have been shown to be worth had they been brought separately.[17]

To begin with, the very vision of "efficiency" articulated by the Court below – and its implication for the meaning of "superiority" under the Rule – is at variance with the understanding of that concept embodied in Rule 23 and

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[17]In *Rhone-Poulenc*, individual plaintiffs had lost in 12 of 13 cases advancing claims similar to those before the court. See *Rhone-Poulenc*, 51 F. 3d at 1299 ("A notable feature of this case . . . is the demonstrated likelihood that the plaintiffs' claims . . . lack legal merit. This is the inference from the defendants' having won 92.3 percent (12/13) of the cases to have gone to judgment."). Recent scholarship by Warren F. Schwartz, a senior member of the law and economics movement, contests the claim of *Rhone Poulenc* that class certification results in unjustifiably large settlements. See Schwartz, "Long-Shot Class Actions: Toward A Normative Theory of Uncertainty," 8 Legal Theory 297, 308-310 (2002) (finding Judge Posner's reasoning "unpersuasive" and concluding that "careful economic analysis" reveals "the weakness of the theoretical foundation for the hostility . . . expressed in the 'economic blackmail' characterization").

employed by the overwhelming majority of Courts of Appeals. See, *e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d at 1023 (upholding certification where "alternative methods of resolution" would "unnecessarily burden the judiciary"); *Sterling v. Velsicol Chem. Corp.*, 855 F. 2d 1188, 1196-1197 (6th Cir. 1988) (stating that "[t]he procedural device of a Rule 23(b)(3) class action was designed . . . to achieve the economies of time, effort, and expense," and affirming certification because "a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts."). Because the decision below conflicts with those decisions, it warrants review by this Court.

But there is more. For in extending *Rhone-Poulenc* to a circumstance in which there will *be* no "process of multiple trials," the decision below conflicts also with those of the Fifth Circuit, which has adopted *Rhone-Poulenc*,[18] because that Circuit understands *Rhone-Poulenc* to be applicable *only where, because of the size of the expected recovery, the prosecution of individual actions is economically feasible.* The Fifth Circuit applies *Rhone-Poulenc*'s efficiency analysis only when the class-action mechanism is not necessary for aggregating negative value suits. See *Castano*, 84 F. 3d at 748 (citing *Rhone-Poulenc* in support of the proposition that "the most compelling reason for finding superiority in a class action" is "the existence of a negative value suit").

Indeed, in teaching from which the Seventh Circuit has now departed, *Rhone-Poulenc* itself recognized that its analysis was applicable only where "it is entirely feasible to allow a final, authoritative determination of . . . liability . . . from a decentralized process of multiple trials, involving different juries, and different standards of liability in different jurisdictions." 51 F. 3d at 1299. In language not quoted by the Court below, Judge Posner wrote that the multiple-jury

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[18] See *Castano*, 84 F. 3d at 746-747.

approach "would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit, even though the aggregate stakes are very large and would repay the costs of a consolidated proceeding." 51 F. 3d at 1300. "The[] qualification[] [concerning feasibility is] important," he emphasized. 51 F. 3d at 1299. "In most class actions – and those the ones in which the rationale for the procedure is most compelling – individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation. That plainly is not the situation here." Id.

This critical distinction is crucial to the reasoning of *Rhone-Poulenc*; without it, the "market" approach cannot be squared with Rule 23(b)(3) – the primary goal of which is to assure access to the courts for small value claims – or with the decisions of the Fifth Circuit following *Rhone-Poulenc*.

With its decision below, the Seventh Circuit stretched beyond recognition the rationale of *Rhone-Poulenc* to those class actions where the hypothesized "decentralization" of claims, with the purported attendant benefit of the creation through multiple jury trials of "a series of decisions or settlements . . . produc[ing] an accurate evaluation of a subset of the claims . . . [so that] the others in that subset can be settled or resolved at an established price," Pet. App. 12a, will never occur, because the claims individually are worth such a small amount. In essence, it found on efficiency grounds that the *non*-adjudication of the claims was preferable to their adjudication using the class action device. The Rules do not license federal courts to make such sweeping assessments of the merits of claims in the name of "superiority" under Rule 23(b)(3). Compare *Hanlon*, 150 F. 3d at 1023 ("In most cases [at issue] litigation costs would dwarf potential recovery. . . . A fair examination of alternatives can only result in the apodictic conclusion that a class action is the clearly preferred procedure in this case.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL ISSACHAROFF
435 West 116th St.
New York, N.Y. 1002
(212) 854-2527

PETER J. RUBIN
Counsel of Record
Georgetown Univ. Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9388

ELIZABETH J. CABRASER
JONATHAN D. SELBIN
LISA J. LEEBOVE
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery St., 30th Floor
San Francisco, CA 94111
(415) 956-1000

DAVID BOIES
STEPHEN R. NEUWIRTH
CYNTHIA M. MOORE
BOIES, SCHILLER & FLEXNER, LLP
570 Lexington Ave., 16th Floor
New York, NY 10022
(212) 446-2300

DON BARRETT
CHARLES F. BARRETT
BARRETT LAW OFFICE, P.A.
404 Court Square North
Lexington, MS 39095
(662) 834-2376

IRWIN LEVIN
RICHARD SHEVITZ
COHEN & MALAD, LLP
136 N. Delaware St., Suite 300
Indianapolis, IN 46204-2538
(317) 636-6481

KEITH M. FLEISCHMAN
ELIZABETH A. BERNEY
DANIEL ALTMAN
MILBERG, WEISS, BERSHAD, HYNES & LERACH LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

Counsel for Petitioners

October 3, 2002

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 02-1437, 02-1438 & 02-1439

In the Matter of:

BRIDGESTONE/FIRESTONE, INC., TIRES PRODUCTS LIABILITY LITIGATION

Appeals of:

BRIDGESTONE/FIRESTONE, INC., BRIDGESTONE CORPORATION, and FORD MOTOR COMPANY

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 00-9373-C-B/S (MDL No. 1373)--Sarah Evans Barker, *Judge*.

ARGUED APRIL 17, 2002--DECIDED MAY 2, 2002

Before EASTERBROOK, MANION, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Firestone tires on Ford Explorer SUVs experienced an abnormally high failure rate during the late 1990s. In August 2000, while the National Highway Transportation Safety Administration was investigating, Firestone recalled and replaced some of those tires. Ford and Firestone replaced additional tires during 2001. Many suits have been filed as a result of injuries and deaths related to the tire failures. Other suits were filed by persons who own (or owned) Ford Explorers or Firestone tires that have so far performed properly; these persons seek compensation for the *risk* of failure, which may be reflected in diminished resale value of the vehicles and perhaps in mental stress. The Judicial Panel on Multidistrict Litigation transferred suits filed in, or removed to, federal court to the Southern District of Indiana for consolidated pretrial proceedings under 28 U.S.C. §1407(a). Once these have been completed, the cases must be returned to the originating districts for decision on the merits. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In an effort to prevent retransfer, counsel representing many of the plaintiffs filed a new consolidated suit in Indianapolis and asked the judge to certify it as a nationwide class action, which would make all other suits redundant. The district court obliged and certified two nationwide classes: the first includes everyone who owns, owned, leases, or leased a Ford Explorer of model year 1991 through 2001 anytime before the first recall, and the second includes all owners and lessees from 1990 until today of Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, or Wilderness tire models, or any other Firestone tire "substantially similar" to them. *In re Bridgestone/Firestone, Inc., Tire Products Liability Litigation*, 205 F.R.D. 503 (S.D. Ind. 2001); see also 155 F. Supp. 2d 1069 (S.D. Ind. 2001). More than 60 million tires and 3 million vehicles fit these definitions.

No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3). Yet state laws about theories such as those presented by our plaintiffs differ, and such differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes. See, e.g., *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). See also *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 746-47 (7th Cir. 2001). The district judge, well aware of this principle, recognized that uniform law would be essential to class certification. Because plaintiffs' claims rest on state law, the choice-of-law rules come from the state in which the federal court sits. See *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). The district judge concluded that Indiana law points to the headquarters of the defendants, because that is where the products are designed and the important decisions about disclosures and sales are made. Ford and Firestone engaged in conduct that was uniform across the nation, which the district court took to imply the appropriateness of uniform law. This ruling means that all claims by the Explorer class will be resolved under Michigan law and all claims by the tire class will be resolved under Tennessee law. According to the district court, other obstacles (such as the fact that the six named tire models represent 67 designs for different sizes and performance criteria, and that half of all 1996 and 1997 model Explorers came with Goodyear tires) are worth overcoming in light of the efficiency of class treatment. Nor did the district court deem it important that Firestone's tires were designed in Ohio, and many were manufactured outside Tennessee, as many of Ford's vehicles are manufactured outside Michigan.

Both Ford and Firestone petitioned for interlocutory review

under Fed. R. Civ. P. 23(f). We granted these requests because, as in *Rhone-Poulenc* and other cases (e.g., *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002)) the suit is exceedingly unlikely to be tried. Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims. Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f). See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Another function is permitting appellate review of important legal issues that otherwise might prove elusive. The district court's conclusion that one state's law would apply to claims by consumers throughout the country—not just those in Indiana, but also those in California, New Jersey, and Mississippi—is a novelty, and, if followed, would be of considerable import to other suits. Our review of this choice-of-law question is plenary, so we start there.

Indiana is a *lex loci delicti* state: in all but exceptional cases it applies the law of the place where harm occurred. See *Hubbard Manufacturing Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Those class members who suffered injury or death as a result of defects were harmed in the states where the tires failed. As a practical matter, these class members can be ignored; they are sure to opt out and litigate independently. These classes therefore effectively include only those consumers whose loss (if any) is financial rather than physical: it is the class of persons whose tires did *not* fail, whose vehicles did *not* roll over. Many class members face no future threat of failure either, because about 30 million tires were recalled and replaced, while other tires have been used up and discarded. Financial loss (if any, a qualification we will not repeat) was suffered in the places where the vehicles

and tires were purchased at excessive prices or resold at depressed prices. Those injuries occurred in all 50 states, the District of Columbia, Puerto Rico, and U.S. territories such as Guam. The *lex loci delicti* principle points to the places of these injuries, not the defendants' corporate headquarters, as the source of law.

Plaintiffs concede that until 1987 this would have been Indiana's approach. They contend, however, that *Hubbard* changed everything by holding that when the place of the injury "bears little connection to the legal action" a court may consider other factors, such as the place of the conduct causing the injury and the residence of the parties. It is conceivable, we suppose, that Indiana might think that a financial (or physical) injury to one of its residents, occurring within the state's borders, "bears little connection to the legal action", but the proof of that pudding is in the eating. Has Indiana since 1987 applied the law of a state where a product was designed, or promotional materials drafted, to a suit arising out of an injury in Indiana? As far as we can tell, the answer is no—not even once, and the state has had plenty of opportunities. Yet since 1987 both Indiana and this court have routinely applied Indiana law when injury caused by a defective product occurred in Indiana to Indiana residents. See, e.g., *Land v. Yamaha Motor Corp.*, 272 F.3d 514, 517 (7th Cir. 2001) (Indiana law); *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. App. 2002). Neither Indiana nor any other state has applied a uniform place-of-the- defendant's-headquarters rule to products-liability cases. It is not hard to devise an argument that such a uniform rule would be good on many dimensions, but that argument has not carried the day with state judges, and it is state law rather than a quest for efficiency in litigation (or in product design decisions) that controls.

"Ah, but this is not a products-liability case!" So plaintiffs respond to the conspicuous lack of support from state decisions.

And indeed it is not a products-liability suit, since all who suffered physical injury are bound to opt out. No injury, no tort, is an ingredient of every state's law. See, e.g., *Fogel v. Zell*, 221 F.3d 955, 960-62 (7th Cir. 2000); *In re Orthopedic Bone Screw Products Liability Litigation*, 193 F.3d 781, 789 (3d Cir. 1999); *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 757 N.E.2d 481 (2001). Plaintiffs describe the injury as financial rather than physical and seek to move the suit out of the tort domain and into that of contract (the vehicle was not the flawless one described and thus is not merchantable, a warranty theory) and consumer fraud (on the theory that selling products with undisclosed attributes, and thus worth less than represented, is fraudulent). It is not clear that this maneuver actually moves the locus from tort to contract. If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.[1]

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[1] Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. See *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 902 (7th Cir. 1994); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only $9,500 per widget—for the expected per-widget cost of injury is $500, and each buyer could have used the difference in price to purchase insurance (or to self-insure, bearing the risk in exchange for the lower price). On this theory the 990 uninjured buyers would collect a total of $495,000. The manufacturer's full outlay of $995,000 ($500,000 to the 10 injured buyers + $495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product's defect. This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system—$500 in damages to every buyer, or $50,000 in damages to every injured buyer—creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess

As a result, most states would not entertain the sort of theory that plaintiffs press. See, e.g., *Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (Mississippi, New York, Pennsylvania, and Texas law); *Angus v. Shiley, Inc.*, 989 F.2d 142, 147-48 (3d Cir. 1993) (Pennsylvania law); *Willett v. Baxter International, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir. 1991) (Louisiana law); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir. 1989) (South Carolina law); *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Ct. App. 1995); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 627, 631 (Ala. 1998); *Yu v. IBM Corp.*, 314 Ill. App. 3d 892, 732 N.E.2d 1173 (1st Dist. 2000); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994).

Obviously plaintiffs believe that Michigan and Tennessee are in the favorable minority; we need not decide. If recovery for breach of warranty or consumer fraud is possible, the injury is decidedly where the *consumer* is located, rather than where the seller maintains its headquarters. A contract for the sale of a car in Indiana is governed by Indiana law unless it contains a choice-of-law clause, and plaintiffs do not want to enforce any choice-of-law clause. Plaintiffs have not cited, and we could not find, any Indiana case applying any law other than Indiana's to warranty or fraud claims arising from consumer products designed (or contract terms written) out of state, unless a choice-of-law clause was involved. State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568-73 (1996). We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana would apply Korean law (no matter

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precautions.

what Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of cars equipped with Michelin tires. Indiana has consistently said that sales of products in Indiana must conform to Indiana's consumer-protection laws and its rules of contract law. See, e.g., *A.J.'s Automotive Sales, Inc. v. Freet*, 725 N.E.2d 955, 963 (Ind. App. 2000) (consumer-protection law); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513-14 (Ind. App. 1988) (contract law). It follows that Indiana's choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits.

Against all of this plaintiffs set a single decision: *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283 (Ind. App. 1997). This decision holds that the adequacy of services rendered by an accountant in Missouri to a business whose headquarters were in Missouri is governed by Missouri law, even when a suit is filed by unpaid lenders who live in Indiana. This is a straightforward application of *lex loci delicti*. The injury, if any, was suffered by the business, which hired and paid the accountant for professional services rendered directly to the client; those who dealt with the audited firm, such as the plaintiffs in *KPMG Peat Marwick*, suffer a derivative injury. Similarly a malpractice claim against a firm's lawyer is determined by the law of the state where the services are performed, for that state's law supplies the standard of performance and that is where the client normally would suffer injury. Investors may be able to step into a corporation's shoes and assert a derivative claim, and in some states (those that have rejected the *Ultramares* doctrine, see *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, J.)) investors may have a direct claim too; but because the firm remains the lawyer's or accountant's client one body of law must apply to this single transaction. Sales of a consumer product in 50 states do not lead to derivative

claims, and each sale is a separate transaction in the place of the sale. *KPMG Peat Marwick* accordingly has no bearing on consumers' suits against manufacturers of allegedly defective products.

Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, we add that this litigation is not manageable as a class action even on a statewide basis. About 20% of the Ford Explorers were shipped without Firestone tires. The Firestone tires supplied with the majority of the vehicles were recalled at different times;[2] they may well have differed in their propensity to fail, and this would require sub-subclassing among those owners of Ford Explorers with Firestone tires. Some of the vehicles were resold and others have not been; the resales may have reflected different discounts that could require vehicle-specific litigation. Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to underinflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may

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[2] On August 9, 2000, Firestone recalled its Radial ATX and Radial ATX II tires, but only in size P235/75R15, plus its Wilderness AT tires in size P235/75R15 (but only if they had been made in Decatur, Illinois). On January 2, 2001, Firestone recalled Wilderness LE tires, size P265/70R16, that had been manufactured the week of April 23, 2000, in Cuernavaca, Mexico. In February 2001 it recalled approximately 98,500 P205/55R16 Firehawk GTA-02 tires, most of which had been installed on Nissan Altima SE cars sold in the United States, Canada, Puerto Rico, and Guam. Finally, on May 22, 2001, Ford began a replacement program for all Firestone Wilderness AT tires in 15-inch, 16-inch, and 17-inch sizes. Other Firestone models, sizes, and plants were not involved in any recall program and these tires, though included in the class definition, may exhibit different (and lower) failure rates. The NHTSA was satisfied that these recalls removed all potentially defective tires from the road and did not require further action. Yet the tire class includes more than twice as many Firestone tires as were recalled.

have been higher in Arizona than in Alaska. Of those vehicles that have not yet been resold, some will be resold in the future (by which time the tire replacements may have alleviated or eliminated any discount) and some never will be resold. Owners who wring the last possible mile out of their vehicles receive everything they paid for and have claims that differ from owners who sold their Explorers to the second-hand market during the height of the publicity in 2000. Some owners drove their SUVs off the road over rugged terrain, while others never used the "sport" or "utility" features; these differences also affect resale prices.

Firestone's tires likewise exhibit variability; that's why fewer than half of those included in the tire class were recalled. The tire class includes many buyers who used Firestone tires on vehicles other than Ford Explorers, and who therefore were not advised to underinflate their tires. (Note that this description does not reflect any view of the merits; we are repeating rather than endorsing plaintiffs' contention that Ford counseled "underinflation.") The six trade names listed in the class certification order comprise 67 master tire specifications: "Firehawk ATX" tires, for example, come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly. Plaintiffs say that all 67 specifications had three particular shortcomings that led to excess failures. But whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and- for-all decision about whether all 60 million tires were defective, even if the law were uniform. There are other differences too, but the ones we have mentioned preclude any finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the

controversy." Fed. R. Civ. P. 23(b)(3). Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone.

The district judge did not doubt that differences within the class would lead to difficulties in managing the litigation. But the judge thought it better to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law. Efficiency is a vital goal in any legal system—but the vision of "efficiency" underlying this class certification is the model of the central planner. Plaintiffs share the premise of the ALI's *Complex Litigation Project* (1993), which devotes more than 700 pages to an analysis of means to consolidate litigation as quickly as possible, by which the authors mean, before multiple trials break out. The authors take as given the benefits of that step. Yet the benefits are elusive. The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. What *is* the law of Michigan, or Arkansas, or Guam, as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from state courts. (Ford asked us to certify legal questions to the Supreme Court of Michigan, to ensure that genuine state law was applied if Michigan's law were to govern the whole country; the plaintiffs stoutly resisted that proposal.) And if the law were clear, how would the facts (and thus the damages per plaintiff) be ascertained? One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident. Similarly Gosplan or another central planner *may* hit on the price of wheat, but that would be serendipity. Markets instead use diversified decisionmaking to supply and evaluate information. Thousands

of traders affect prices by their purchases and sales over the course of a crop year. This method looks "inefficient" from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. See Thomas Sowell, *Knowledge and Decisions* (1980). When courts think of efficiency, they should think of market models rather than central-planning models.

Our decision in *Rhone-Poulenc Rorer* made this point, and it is worth reiterating: only "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions" (51 F.3d at 1299) will yield the information needed for accurate evaluation of mass tort claims. Once a series of decisions or settlements has produced an accurate evaluation of a subset of the claims (say, 1995 Explorers in Arizona equipped with a particular tire specification) the others in that subset can be settled or resolved at an established price. See David Friedman, *More Justice for Less Money*, 39 J.L. & Econ. 211 (1996).

No matter what one makes of the decentralized approach as an original matter, it is hard to adopt the central- planner model without violence not only to Rule 23 but also to principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. See *BMW v. Gore*, 517 U.S. at 568-73; *Szabo* (reversing a nationwide warranty class certification); *Spence v. Glock, G.m.b.H.*, 227 F.3d 308 (5th Cir. 2000) (reversing a nationwide tort class certification); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 579 (1996); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DePaul L. Rev. 755, 781 (1995); Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault*

on State Sovereignty, 54 La. L. Rev. 1085 (1994). Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

The motion to certify questions of law to the Supreme Court of Michigan is denied as unnecessary in light of this opinion. The district court's order certifying two nationwide classes is

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re BRIDGESTONE/	)	
FIRESTONE, INC.	)	
TIRES PRODUCTS	)	IP 00-9373-C-B/S
LIABILITY LITIGATION	)	MDL No. 1373
	)	
THIS DOCUMENT	)	
RELATES TO ALL	)	
THE ACTIONS	)	(centralized before Hon. Sarah Evans Barker)

ORDER GRANTING MOTION FOR CLASS CERTIFICATION AND RULING ON RELATED MATTERS

INTRODUCTION

The Judicial Panel on Multidistrict Litigation ("MDL") transferred this action to this court, pursuant to 28 U.S.C. § 1407, on October 26, 2000. On January 2, 2001, Plaintiffs in a number of transferred cases filed their Master Complaint in this district against Ford Motor Company ("Ford"), Bridgestone/Firestone, Inc. ("Firestone"), and Bridgestone

Corporation ("Bridgestone"). One month later, Plaintiffs filed a Motion for Class Certification. For the reasons explained below, on November 28, 2001, we *GRANTED* in part and *DENIED* in part the Motion for Class Certification. Defendants filed Motions to Reconsider the November 28, 2001 Order. We now set forth fully our reasons for the class certification order, and in doing so, hereby *DENY* Defendants' Motions to Reconsider that ruling.[1] Also as explained below, Ford's Motion for Reconsideration of the Court's "Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint" ("July 27, 2001 Order") is *DENIED.* For similar reasons, Firestone's Motion for 28 U.S.C. § 1292 Certification of the July 27, 2001 Order is *DENIED.* This entry also explains our decision to *GRANT* Plaintiffs' Motion for Reconsideration of Ruling on the Scope of the TCPA[2] /MCPA[3] in July 27 Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint. Further, it is ordered that Plaintiffs submit for approval by January 16, 2002, the proposed notice to class members and tender therewith their proposed method and schedule for disseminating said notice.

PRELIMINARY MATTERS

A. Choice of Law Determination in the July 27, 2001 Order

In connection with the July 27, 2001 Order on Defendants' Motion to Dismiss, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 155 F. Supp.2d 1069 (S.D. Ind. 2001),

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[1] The classes are defined as set forth in the November 28, 2001 Order Certifying Classes.

[2] Tennessee Consumer Protection Act. Tenn. Code Ann. § 47-18-102 *et seq.*

[3] Michigan Consumer Protection Act. Mich. Comp. Laws § 445.901 *et seq.*

the Court determined that, under Indiana choice of law rules, Michigan law applies to the Class Plaintiffs' claims against Ford and Tennessee law applies to the Class Plaintiffs' claims against Firestone. Ford has asked us to reconsider that ruling or, in the alternative, to certify the choice of law question to the Indiana Supreme Court. Firestone has filed a motion requesting that we certify the ruling for an interlocutory appeal to the Seventh Circuit pursuant to 28 U.S.C. § 1292(b).

Firestone's Motion for 28 U.S.C. § 1292 Certification is easily resolved. It is clear that Firestone seeks review of the choice of law determination, not because of its impact on the Court's substantive rulings that certain claims alleged in the Master Complaint should not be dismissed,[4] but instead because of its impact on the propriety of class certification. The choice of law determination set forth in the July 27, 2001 Order is, in fact, an important element of the class certification analysis and is hereby incorporated by reference into our ruling on class certification. Accordingly, should the Seventh Circuit be inclined to review the choice of law determination, it will have the opportunity to do so as part of an appeal of the class certification ruling, which Defendants may seek pursuant to Federal Rule of Civil Procedure 23(f). Therefore, we deny Firestone's request for certification of the July 27, 2001 Order for interlocutory appeal.

Ford's Motion for Reconsideration of the Court's July 27, 2001 Order also is quickly addressed, inasmuch as it does little more than rehash arguments we considered and addressed the

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[4] Firestone gives no more than lip service to the notion that the Court would have dismissed additional claims of some of the named Plaintiffs had it applied the law of each Plaintiff's home state, rather than Tennessee law, to those claims, failing even to attempt to analyze how and to what extent that would be so. *See* Firestone's Memorandum of Support of Motion for 28 U.S.C. § 1292 Certification at 3.

first time around. A motion to reconsider under Rule 59 "is not a vehicle for rearguing previously rejected motions," *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001), and Ford's motion essentially does just that.[5] The only new argument made in Ford's motion to reconsider is its complaint that the Court's ruling "effectively declares erroneous all parallel rulings by Indiana's appellate courts." *See* Ford's Motion to Reconsider at 6-8. However, as Ford acknowledges, not one of the "parallel rulings" (in Indiana breach of warranty cases) it cites for the proposition that choice of law for contract-based claims is dictated by the place of purchase of an allegedly defective product contains any explicit choice of law analysis. Rather, Ford attempts to fashion binding precedent out of the fact that in the cases it cites "Indiana courts and the parties *instinctively*

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[5] In their challenge to the Court's choice of law determination in the July 27, 2001 Order, Defendants focus primarily on choice of law for purposes of the Class Plaintiffs' contract-based claims (warranty and unjust enrichment), which holdings the Court incorporates in this entry. Defendants, however, also have challenged the Court's choice of law ruling with respect to the Class Plaintiffs' tort claims, acknowledging that those claims (based on consumer protection statutes) were the subject of a motion to reconsider filed by Plaintiffs and, thus, remain at issue in this case. Because the Court is granting Plaintiffs' motion to reconsider portions of its July 27, 2001 Order relating to claims under the Michigan and Tennessee consumer protection acts, we address briefly here Defendants' arguments that the choice of law determination for tort claims was incorrect. As with their contract choice of law arguments, Defendants have done nothing more than re-hash (though perhaps more vehemently) the arguments they have already advanced. Moreover, Defendants' motions do not even acknowledge, let alone distinguish, the Indiana decisions upon which this Court relied in making its ruling, nor do they address the important distinction we drew in the July 27, 2001 Order between choice of law in this "no injury"/"no manifestation of defect" case and cases involving personal injury to the plaintiff. *See Bridgestone/Firestone*, 155 F. Supp.2d at 1081 n.9. In any event, we have examined this issue at length in connection with the July 27, 2001 Order and reaffirm the conclusions reached there.

applied the law of the place where the product was purchased and used." *Id.* at 8. We do not infer as much from the courts' silence in these cases. That these courts did not make a choice of law analysis is not surprising, in light of the fact that "[i]t is well established in Indiana that if the law of another state is not pleaded or no steps are taken to require the court to take judicial notice of that law ... the court will presume the law in that jurisdiction is substantially the same as the law in Indiana." *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 691 (Ind. 1986). Therefore, the courts of Indiana typically will apply Indiana law unless the parties raise a conflict of laws issue. And, given the general uniformity of warranty law, it is also not surprising that the parties rarely have any reason to urge the application of another state's laws.

Indeed, the weakness of Ford's contention that choice of law should be made with reference to the place where the product was "purchased and used" is apparent, because a product is not necessarily purchased and used in the same state. Ford concedes in a footnote that Defendants argued in the context of their motion to dismiss that the law of the state of each Plaintiff's residence should apply, but it now appears to argue that the law of the state in which each Plaintiff purchased the Tires[6] or Explorers should apply, explaining that "[s]ince consumers normally buy tires and vehicles at or near their place of residence, defendants intended the term 'residence' to be shorthand for an amalgam of these factors—the place of contracting to buy the tires and/or vehicle, the place of contract negotiations, the site of performance, and the location of the contract's subject matter." Ford's Motion to Reconsider at 10 n.11. Obviously, it would not be unusual for consumers who, for example, live in communities bordering two or more states regularly to purchase products outside their state of residence.

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[6] The term "Tires," as used in this entry, means those tires set forth in the Class definition contained in the Court's November 28, 2001 Order.

Ford does not explain why the states of purchase, rather than the states of Plaintiffs' residence, should apply. And what about the state in which the vehicle (and the Tires on it) was primarily used, which could be a different state altogether (or, perhaps for some Plaintiffs, numerous states)?

Ford also did not explain in its briefing on the motion to dismiss, and does not explain now, why it believes that the state in which each Plaintiff purchased his or her Explorer is more intimately connected to the facts relevant to this case than Michigan, the state in which countless relevant acts by Ford employees were undertaken over a period of many years. The closest Defendants come to such an explanation is their argument that Plaintiffs, as consumers, would not have expected Tennessee or Michigan law to apply to their claims, and indeed that such a thought would likely have "shocked" them. Supp. Memo in Opp. at 16. Fortunately even for the Defen-dants, courts generally do not decide legal issues based upon the emotional reactions of lay persons. The Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), does instruct that the expectation of the parties is an important consideration in determining whether the application of a particular state's law is so "arbitrary and unfair" that it exceeds constitutional limits. However, not surprisingly, Defendants cite no case in which the application of the law of the defendant's home state, where significant conduct relevant to the plaintiff's claim took place, was found to be unconstitutional.[7]

The remainder of Ford's arguments are addressed in the July

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[7] The application of Kansas law was found unconstitutional in *Shutts* as to many of the plaintiffs in a nationwide class action suit because those plaintiffs' claims had absolutely no connection to Kansas whatsoever—neither the plaintiff nor the defendant resided in Kansas, and no conduct relevant to the dispute took place in Kansas.

27, 2001 Order, *Bridgestone/Firestone*, 155 F. Supp.2d at 1078-85, and we decline Ford's request to reexamine those arguments now. We further deny Ford's request that we certify the choice of law question to the Indiana Supreme Court.

B. Choice of Law as Affected by the Evidentiary Submissions Made in the Class Certification Context

When we made our choice of law determination in the context of our July 27, 2001 Order, we took as true all of the Plaintiffs' allegations, including their factual allegations relevant to the choice of law determination. Consistent with the holding in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 348, we invited the parties to present any facts relevant to the choice of law analysis in the context of the class certification briefing and argument because, as *Szabo* makes clear, a trial court is required to resolve relevant factual disputes in ruling on a motion for class certification.[8] In response to the Court's invitation, Firestone submitted evidence as part of its opposition to the Plaintiffs' Motion for Class Certification which it contends contradicts the factual allegations made by the Plaintiffs regarding the choice of law issue.[9] Specifically, Firestone has submitted evidence that demonstrates the following:

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[8] *See* Order Setting Hearing dated September 7, 2001; Transcript of November 16, 2001 Hearing on Plaintiffs' Motion for Class Certification ("Transcript") at 8.

[9] Other than a passing reference by Ford to the fact that not all of its activities related to advertising took place in Michigan, Ford did not submit any evidence, either with its written submissions or at the class certification hearing, to suggest that its actions relevant to the Plaintiffs' claims took place somewhere other than Michigan.

1. Firestone's engineers perform their tire design work in Akron, Ohio, not Tennessee. Supp. Memo. at 12 (citing Wyant Dep. at 283; Lampe Dep. at 610);

2. Firestone's national advertising (which presumably is approved in Tennessee, although Firestone does not say) is limited; the majority of advertising is conducted "by Firestone's regional offices, local affiliated Firestone stores, and independent, unaffiliated tire dealerships and mass merchandisers" in states other than Tennessee. *Id.* at 13.

3. Warranty adjustment data was collected "in the field" by Firestone's regional offices around the nation. *Id.* at 13-14 (citing Ball Dep. at 86; Laubie Dep. at 66). Notably, however, Firestone fails to cite to Mr. Ball's testimony that this warranty adjustment data was sent to, and analyzed by, Firestone in Tennessee. Ball Dep. at 87. Firestone does not explain why the places adjustment data was collected, rather than the centralized place it was analyzed, is a significant factor.[10]

Firestone's evidence does demonstrate that not all of Firestone's conduct relevant to Plaintiffs' claims took place in Tennessee, and indeed that certain significant aspects of its conduct—the actual design of the Tires by Firestone's engineers—took place outside of Tennessee.[11] Even so, Firestone has not demonstrated

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[10] Firestone also points to the fact that the Tires were manufactured at various Firestone plants outside of Tennessee; however, because Plaintiffs do not assert that the Tires have a manufacturing defect, the place of manufacture is irrelevant to the choice of law analysis.

[11] We note that Firestone does not argue that the law of Ohio, where the design of the Tires took place, should apply to the Plaintiffs' claims against it.

that the preponderance of its relevant conduct took place somewhere other than Tennessee.

In making choice of law decisions in contract cases, Indiana courts " 'will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact.' " *Hubbard Mfg. Co., Inc. v. Greeson,* 515 N.E.2d 1071, 1073 (Ind. 1987) (quoting *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (1945)). This rule was first articulated by the Indiana Supreme Court in *Hughes,* in which the Court found persuasive the reasoning of the authors of a commonly-used casebook of the time, Harper and Taintor, *Cases on Conflict of Laws,* (1937):

> Many courts purport to find the most significant contact point, with respect to contractual transactions, at the place intended by both parties. It seems, rather, that these courts examine all the circumstances which could be supposed to have influenced the actions of the parties, and find the most intimate contact at that place which might be characterized as the center of gravity of the circumstances.
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> There is evident benefit in taking this accumulation of contact points as paramount, since then many difficult questions with respect to the identification of the place of contracting or the place of performance will be avoided; and, furthermore, this result harmonizes with a sense of appropriateness: that is to say, *it is appropriate that a transaction be governed by the law of the state with which it is most closely in contact, not because of the quasi-localization of a legal concept-place of contracting, place of performance, intention of the*

> *parties—but because of the closeness of factual contacts between that state and the significant acts of the parties.*

Hughes, 63 N.E.2d at 423 (emphasis added). In other words, the Indiana Supreme Court rejected a mechanical "place of breach" rule in favor of a more flexible rule that looks to the law of the state in which the "significant acts of the parties" took place. *See Greeson*, 515 N.E.2d at 1073 (so characterizing the *Hughes* holding). Subsequent Indiana cases have considered the following factors, set forth in the Restatement (Second) of Conflict of Laws, as among those relevant to this analysis: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties. *See, e.g., Travelers Indemnity Co. v. Summit Corp. of America*, 715 N.E.2d 926, 931 (Ind. Ct. App. 1999); *Eby v. York-Division, Borg- Warner*, 455 N.E.2d 623, 626 (Ind. Ct. App. 1983) (both citing *Restatement (Second) of Conflict of Laws* § 188 (1971)).

Both Defendants cite the Restatement factors and insist that the law of the state in which each Plaintiff purchased Defendants' product(s) must apply to that Plaintiff's claims. However, Defendants' analysis is flawed in several respects. First, Defendants argue that the relevant contract is the purchase of the Explorer or Tires, and therefore the place of performance was the place of the purchase. As to the breach of warranty claims, this is simply incorrect. The relevant contract is the warranty, and because Plaintiffs presumably could have sought performance under the warranty in any state upon discovering a defect, the place of performance was unknown at the time of the purchase. The place of performance is "assigned little weight when, as here, at the time of contracting the place of performance is either uncertain or unknown." *Employers Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1024

(Ind.Ct.App.1999) (citing *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 291 (Ind. Ct. App. 1997) and *Restatement (Second) of Conflict of Laws* § 188 cmt. e (1971)). The Defendants also argue that the place of negotiation is relevant, which ignores the practical reality that the warranties at issue were not negotiated at all, but rather either were standard written warranties, the terms of which were determined entirely by the Defendants, or were, in the case of the implied warranty of merchantability, simply implied by law. Therefore, the place of negotiation is not a relevant factor in this case. We also accord little weight to the location of the contract's subject matter in this case, in that both the Explorer and the Tires are, by their very nature, designed to be mobile. Further, "standing alone, the place of contracting is a relatively insignificant contact." *Travelers Indem. Co.*, 715 N.E.2d at 932 (quoting *Restatement (Second) of Conflicts of Laws* § 188 cmt. e (1971)).

The remaining two *Restatement* factors are the plaintiff's domicile and the defendant's domicile. Substantial (although, as Firestone has demonstrated, not all) conduct relevant to Plaintiffs' claims took place at each Defendant's principal place of business, while Defendants have pointed to no corresponding substantial relevant conduct that took place in Plaintiffs' home states. Accordingly, having considered all the evidence presented by the parties, we reaffirm our prior determination that Michigan and Tennessee are the states with the most intimate contacts with the facts relevant to Plaintiffs' claims, and therefore, under Indiana choice of law rules, the law of Michigan must be applied to the claims against Ford and the law of Tennessee must be applied to the claims against Firestone.

C. Ford's Motion to Reconsider Rejection of Its "No Injury" Argument

In its motion to reconsider the July 27, 2001 Order, Ford

takes issue with the Court's determination that, unlike their tort claims, Plaintiffs' breach of warranty and unjust enrichment claims were not subject to dismissal based upon the fact that Plaintiffs suffered no manifest injury as a result of the defects they allege. Our July 27, 2001 Order fully addresses Ford's arguments on this issue, and we deny Ford's request to reexamine those arguments. We also decline Ford's invitation to certify the question to the Michigan Supreme Court.

D. Plaintiffs' Motion to Reconsider Availability of Nationwide Class Actions Under the TCPA and MCPA

In the July 27, 2001 Order, the Court dismissed Plaintiffs' Tenth Claim for Relief to the extent Plaintiffs asserted such claims against Firestone and Ford "for all others similarly situated."[12] We held that "Plaintiffs cannot maintain a class action under either the TCPA or MCPA" because (1) "[b]y its terms, the TCPA does not provide for class actions," and (2) class actions may be brought under the MCPA only on behalf of "Michigan residents and injurees." *Bridgestone/Firestone*, 155 F. Supp.2d at 1105. Plaintiffs ask us to reconsider this ruling on the grounds that the TCPA actually does permit class actions and that Federal Rule of Civil Procedure 23 trumps any state law purporting to limit class actions in federal court based on state law. Plaintiffs' Motion to Reconsider at 3.

This situation presents a classic case for reconsideration. Reconsideration is appropriate where the court "has made a decision outside the adversarial issues presented to the Court by the parties." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*,

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[12] In our earlier ruling, we allowed that Plaintiffs may be able to maintain their consumer protection act claims on an individual basis, after alleging reliance, but not as a class action. The aspect of our ruling related to reliance is addressed in the section of this entry concerning predominance.

906 F.2d 1185, 1191 (7th Cir. 1990). Due to the parties' opposing positions on choice of law, Defendants did not raise the issue of unavailability of classwide relief under the TCPA or the MCPA until their reply brief. Hence, Plaintiffs did not squarely address this issue in their argument in opposition to the motion to dismiss. Absent adversarial briefing on this problem, certain key cases were not called to our attention. We examine our prior ruling in light of these cases.

In *Bridgestone/Firestone*, 155 F. Supp.2d at 1105, we addressed the meaning of the terms of the TCPA. Specifically, the statute permits "[a]ny person who suffers an ascertainable loss of money or property ... as a result of the use or employment ... of an unfair or deceptive act or practice ... [to] bring an action *individually* to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) (emphasis added). Based on this language, we accepted Defendant Firestone's argument that class actions are not permitted under the TCPA. *Bridgestone/Firestone*, 155 F. Supp.2d at 1105. However, in requesting reconsideration, Plaintiffs make two points. First, Tennessee state courts have certified classes in cases involving claims under the TCPA. *See Carter v. First Tennessee Bank*, No. 3894 (Fayette Cty. Cir. Ct., Jan. 8, 2001) (certifying a class for TCPA and other claims); *Robinson v. EMI Music Dist.*, 1996 WL 495551 (Tenn. Cir. Ct. 1996) (same); *Crump v. WorldCom, Inc.*, 128 F. Supp.2d 549, 552 (W.D. Tenn. 2001) (remanding case involving TCPA claims to state court, where class previously had been conditionally certified). Defendant Firestone correctly notes that none of these cases has specifically addressed the issue raised by the language of the TCPA authorizing individual actions. Opp. at 10. However, we find that the courts in *Carter*, *Robinson*, and *Crump* have at least implicitly, and necessarily, interpreted the TCPA not to preclude class actions. This point brings us to the second matter raised in Plaintiffs' briefs: in general, we must defer to a state court's interpretation of the state's statute.

Williams v. Duckworth, 738 F.2d 828, 833 (7th Cir. 1984). We acknowledge the possibility that Tennessee lower courts might have misinterpreted the state statute,[13] but we are unwilling to contradict their decisions regarding the TCPA, now that we know of these cases, in favor of our prior finding. *See U.S. ex rel. Burnett v. Illinois*, 619 F.2d 668, 671 (7th Cir. 1980) ("Errors in the interpretation of state authority are for the state supreme court to correct."). Hence, we find that based on interpretations by Tennessee courts, nothing in the TCPA prohibits this court from certifying a class of consumer protection claimants.

We turn next to address Plaintiffs' arguments concerning our prior decision that the MCPA prohibits nationwide class actions. The MCPA states that "[a] person who suffers a loss as a result of a violation of this act may bring a class action *on behalf of persons residing or injured in this state* for the actual damages caused by [the acts prohibited]." Mich. Comp. Laws § 445.911(3) (emphasis added). In our earlier ruling, we noted that none of the named Plaintiffs are from Michigan and that Plaintiffs did not argue that all members of the proposed classes were either injured in Michigan or residents of Michigan. On this basis, in light of the statutory language, we concluded that Plaintiffs could not maintain a nationwide class. Defendant Ford urges the Court to adhere to its earlier ruling. Plaintiffs, in their motion to reconsider, argue that *Erie* principles require the application of Federal Rule of Civil Procedure 23 in federal court, rather than the use of any state law attempting to limit state-law based class actions. Plaintiffs' Motion to Reconsider at

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[13] We note, in defense of the Tennessee courts' decisions to certify classes, that the term "individual" in statutory language often is not interpreted to exclude the possibility of class certification. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable to them.").

3 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). We consider Plaintiffs' motion to be well taken.

The shorthand of *Erie* is that federal courts sitting in diversity cases "apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). The difficulty in using the *Erie* formula is in determining whether a disputed rule is "substantive" or "procedural." Because the federal law at issue here is a Federal Rule of Civil Procedure, our task in applying *Erie* principles to the case before us is slightly different. In *Hanna*, the Supreme Court directed:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

380 U.S. at 471. Therefore, first we must determine whether the scope of Rule 23 is sufficiently broad to control the issue before us. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980); *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 4-5 (1987). If so, and if the Federal Rule is consistent with the Rules Enabling Act and the Constitution, then we must apply Rule 23. *Hanna*, 380 U.S. at 471.

We find that Rule 23 does cover the situation before us. As we noted in our earlier ruling, Plaintiffs may be able to maintain individual consumer protection claims against Ford under the MCPA, regardless of their states of residence or injury. *In re Bridgestone/Firestone*, 155 F. Supp.2d at 1106 (citing *Nesbitt v. American Community Mutual Ins. Co.*, 600 N.W.2d 427, 433

(Mich. Ct. App. 1999) (permitting non-resident plaintiff to sue his deceased wife's Michigan health insurer under MCPA)). Hence, Plaintiffs have the substantive right to sue Ford for its alleged violations of the consumer protection act. The question before us now is *how* these Plaintiffs can proceed in pursuing relief. Federal Rule 23 covers this issue. It sets forth numerous standards for determining whether a class action is maintainable. If Plaintiffs satisfy these standards, a question examined elsewhere in this opinion, then they can pursue relief as a group. If not, then each claimant is left with the procedural remedy of suing on an individual basis.

Defendant Ford argues that the MCPA's restrictions on who may sue under the Act's class litigation provisions are substantive and that, therefore, Federal Rule 23, a procedural apparatus, does not control the issue before the court. Opp. to Reconsideration at 4. Ford's argument is based on the refinement of *Hanna* contained in *Burlington Northern* and *Walker*. In *Burlington Northern*, the Supreme Court required that the Federal Rule in question be "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for operation of that law." 480 U.S. at 4-5 (quoting *Walker*, 446 U.S. at 749-50). Ford is wrong on two grounds, however, to conclude on the basis of *Burlington Northern* and *Walker*, that "nothing in [Rule 23] sets up a 'direct collision' with the MCPA's substantive provisions limiting a person's right to bring consumer act claims to a narrow class of individuals." Opp. to Reconsideration at 4.

First, we do not find that the MCPA's limit of consumer actions to persons residing or injured in Michigan is substantive. The right to sue for damages caused by representing that a good is new when it is not, by representing that a good has sponsorship that it does not have, or by failing to reveal a material fact about a good is the substantive right granted by the MCPA. *See* Mich. Comp. Laws § 445.903(c)-(d), (s). Whether

that substantive right can be vindicated through a class action or whether it must be pursued individually is a procedural question.[14] In *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345-46 (7th Cir. 1997), the Seventh Circuit ruled that the 30-day notice required before commencing a class action under a provision of the Wisconsin consumer protection act must give way to Rule 23, which does not contain a notice provision. The court in *Mace* ruled that the statutory designation of class action status to persons providing 30-days' notice to the defendant did not grant or deny a substantive right, but rather set forth a requirement as to how that substantive right was to be effectuated. *Id.* at 346. Likewise, here, the statutory designation of class action status to persons injured or residing in Michigan does not grant or deny a substantive right, but explains how the substantive right to sue for consumer protection violations is to be exercised. Ford argues that whether one can sue on a representative basis (rather than whether one can sue at all) is a substantive right. *See* Opp. to Reconsideration at 3 n.2. Ford's citation to *Mace* on this point is unavailing for the reasons just explained. Ford also cites *Kreindler v. Marx,* 85 F.R.D. 612, 616 (N.D. Ill. 1979), in support of the proposition that whether class action status is available is a substantive right. *Kreindler* cannot do the labor Ford asks of it. In *Kreindler,* the district court ruled that plaintiff's status and standing as a shareholder to bring a derivative suit was a matter of state substantive law, not a question of Federal Rule 23.1. *Id.* However, status as a shareholder is the essence of what it means to bring a suit on behalf of the corporation to enforce the corporation's rights. For instance, a person who is not a shareholder does not suffer the type of injury a derivative suit addresses. In contrast, when a

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[14] Apparently, Tennessee courts view this issue similarly. For instance, in *Carter,* the court seems to have accepted the proposition that the named plaintiffs had a cause of action under the TCPA. The court then looked only to Tennessee Rule of Civil Procedure 23 to determine if the procedural requirements of class certification had been met.

consumer does suffer the injury a consumer protection statute addresses, Rule 23 establishes the mechanism through which this consumer can bring an action in conjunction with other consumers who allegedly suffered injury as a result of the same conduct.

Second, contrary to Ford's argument, there is a direct collision between Rule 23 and § 445.911 of the MCPA. Although the court in *United States v. Dentsply Int'l, Inc.*, 2001 WL 624807, at *16 (D. Del. March 30, 2001), reached the conclusion advanced by Ford, reasoning that "Rule 23 ... governs the manner of determining whether class certification is appropriate in federal courts; § 901(b) [a New York law barring class actions to recover a penalty] establishes a bar to certain claims being considered for class action treatment on a threshold level," we do not find this reasoning persuasive. Rule 23 does indeed set up the criteria for determining whether to certify a class. It instructs courts to look at numerosity, commonality of issues, and adequacy of representation, among other factors. Fed.R.Civ.P. 23. However, the MCPA, insofar as it attempts to limit class actions to those residing or injured in Michigan, does not "bar" certain claims from being considered for class action status. Instead, it adds another criterion—injury or residence in Michigan—not contemplated by Rule 23's requirements of numerosity or commonality of issues. *See Califano*, 442 U.S. at 702 ("Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule."). In fact, this criterion conflicts with Rule 23, and in such situations, the federal rule controls. *See Hanna*, 380 U.S. at 465; *Burlington Northern*, 480 U.S. at 7 (rendering ineffective state rule severely limiting discretion provided for by Federal Rules).[15]

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[15] Defendant also argues that applying Rule 23 in this situation would transgress the Rules Enabling Act by creating a substantive right denied by

For all of these reasons, the Court, having again considered its July 27, 2001 Order, now determines that nationwide class actions can be maintained to assert claims under the MCPA and TCPA.

CLASS CERTIFICATION IS APPROPRIATE

On February 2, 2001, Plaintiffs filed a Motion for Class Certification, and the parties briefed the issue. On July 27, 2001, the Court ruled on Defendants' Motion to Dismiss. *Bridgestone/Firestone, Inc.*, 155 F. Supp.2d 1069. Because this ruling eliminated certain causes of action, we invited the parties to engage in supplemental briefing, which they have now completed. On November 16, 2001, a hearing on class certification was conducted at which the parties presented arguments and evidence in support of their respective positions. In our ruling dated November 28, 2001, we granted class certification in part and denied in part Plaintiffs' motion. The order now being issued reaffirms that ruling and explains the basis for our conclusion to certify an Explorer Class and Sub-Class and a Tire Class. We also set forth our reasons for denying Plaintiffs' motion to certify a class of persons alleging property damage.

A. Standard for Class Certification

A class is appropriate for certification only if it meets the four prerequisites to a class action set out in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed.R.Civ.P. 23(a). Once this hurdle is cleared, the court also must ensure that the proposed class satisfies one of

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Michigan law. Opp. to Reconsideration at 7. For the reasons explained above, Rule 23 does not create a substantive right; it merely provides a means of effectuating the right granted by the MCPA.

the three standards established by Rule 23(b). Here, Plaintiffs argue that the class can be certified under Rule 23(b)(3) or as a hybrid "23(b)(2)/(b)(3)" class action. Supplemental Memo. in Support at 1. Rule 23(b)(3) examines whether common questions of law or fact predominate over questions affecting individual members of the class and whether a class action is a superior method for resolving the controversy. Rule 23(b)(2) authorizes class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

As mentioned earlier, *Szabo*, 249 F.3d at 675-76, controls the degree to which we examine the evidence submitted on the issue of class certification. In *Szabo*, the Seventh Circuit chastised the district court for accepting the allegations of the complaint as true when deciding whether to certify a class. 249 F.3d at 675 ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."). Instead, the Court of Appeals directed that a district court must "make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. We understand our responsibility to be to receive evidence and resolve disputes pertaining to class certification even when that means "mak[ing] a preliminary inquiry into the merits." *Id.* With *Szabo* in mind, we begin by examining the four criteria identified in Rule 23(a).

B. Requirements of Rule 23(a)[16]

(1) Numerosity

A proposed class must be so large that joinder of all parties would be impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs claim that the proposed Tire Class and Explorer Class each consists of more than one million persons throughout the United States. Memo. in Support at 10. Defendants do not contest numerosity, and no evidence has been presented calling into question Plaintiffs' estimate of class size. Hence, the Court finds that the numerosity requirement for class certification has been met.

(2) Commonality

To maintain a class action, there must be questions of law or fact common to the class. Fed.R.Civ.P. 23(a)(2). The commonality requirement is ordinarily satisfied when there is "a common nucleus of operative facts." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). Not all questions of law or fact need to be identical as long as there are common questions at the heart of the case. *Hubler Chevrolet, Inc. v. General Motors Corp.,* 193 F.R.D. 574, 577 (S.D. Ind. 2000) (citations omitted). Plaintiffs maintain that Defendants' conduct in designing, warranting, advertising, and selling unreasonably dangerous products to customers, while engaging in a common plan to conceal these dangers, constitutes a common question of law or fact. A focus on the defendants' conduct often satisfies the commonality requirement. *Cf. Service Spring, Inc. v. Cambria*

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[16] The briefing of the parties reveals that there are no real disputes among them as to Plaintiffs' ability to make these showings. Lacking a formal stipulation among them, however, and to the extent there are differing views, we address each requirement here and in the context of our Rule 23(b) ruling.

Spring Co., 1984 WL 2925, at *2 (N.D. Ill. Jan.6, 1984) (defendants' alleged conspiracy and concealment of conspiracy satisfied commonality requirement in antitrust case). Furthermore, Defendants contest this issue only tangentially in their argument against predominance. Opp. at 11. For these reasons, we conclude that Plaintiffs satisfy the commonality requirement of Rule 23(a)(2)

(3) Typicality

Rule 23(a) further requires that "the claims ... of the representative parties are typical of the claims ... of the class." Fed.R.Civ.P. 23(a)(3). This requirement is satisfied where the named plaintiffs' claims "arise[ ] from the same ... practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983) (citation omitted). Here also, Defendants challenge typicality primarily as part of their attack on predominance. Named Plaintiffs for the Tire Class, like all members of the Tire Class, base their claims on the same set of activities engaged in by Firestone; namely the design, marketing, and distribution of faulty Tires. Likewise, the named Explorer Plaintiffs owned or leased allegedly defective vehicles at allegedly inflated prices, as did the members of the proposed class. Therefore, we find that the representatives' claims are "substantially similar," thereby satisfying the typicality requirement. *See Ruiz v. Stewart Associates, Inc.*, 171 F.R.D. 238, 242 (N.D. Ill. 1997) (citation omitted).

(4) Adequacy of Representation

The named representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The adequacy standard involves two elements: one relates to the adequacy of the named plaintiffs' representation of the class and

requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977). Defendants, for good reason, we think, do not challenge the adequacy of the proposed class counsel's representation of the class. In our December 8, 2000 Order on Plaintiffs' Management Structure and Various Case Management Matters, we appointed these lawyers, after consideration of their qualifications, to the Plaintiffs' Executive Committee and to six topic-centered subcommittees. Accordingly, our analysis focuses on the first of the two factors.

Rule 23(a)(4) prohibits conflicts between proposed class representatives and members of the class in order to ensure that "the named plaintiff[s'] claim[s] and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997). Courts addressing adequacy must "assess the likelihood that a conflict of interest may exist." *Susman*, 561 F.2d at 94. Defendants maintain that "conflicts abound" between the class representatives and the members of the proposed class. Opp. at 93. Specifically, they argue that the proposed classes create the following types of conflicts among putative class members: (1) class members who own recalled Tires have different interests from those who own Tires that have not been recalled; (2) class representatives and class counsel may undertake and have undertaken strategies to enhance the likelihood of class certification that may not be favorable to some members; (3) the claims of proposed class members who have had problems with their Tires or Explorers will be diluted by the presence of members who have not; (4) some Explorer diminution class members will have stronger claims than others; and (5) those who own the Tires but not Explorers (and vice versa) will have varying interests as to

which Defendant is saddled with the blame. Opp. at 93-95.

We do not find Defendants' examples of potential conflicts to be so threatening as to preclude class certification. For instance, Defendants argue that there is a conflict between those with Tires subject to the August 9 recall as compared to those who own Tires subject to the September 1 advisory as compared to those who own Tires not subject to either remedial action. Opp. at 93. In support of their argument, Defendants cite deposition testimony from two named Plaintiffs. *Id.* One plaintiff, James Conley Stone, Jr., stated that "[o]nly people that ... have the recall tires, I believe, should be a part of the lawsuit." Stone Dep. at 27. Another plaintiff, Timothy Trouy, stated that he believes that "every tire manufactured by Firestone should be subject to a recall." Trouy Dep. at 50. We first point out that many plaintiffs, even in individual suits, lack a sophisticated understanding of their claims or of legal strategy. Defendants cite no cases in support of the proposition that such lack of knowledge necessarily impedes class certification. In fact, there is case law to the contrary. *Paper Systems Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 609 (E.D. Wis.2000) ("[T]here is no requirement that the representative plaintiff be knowledgeable of either the allegations or the legal theories on which the law rests."). Furthermore, Defendants have offered no explanation of how this issue, should it become a problem, could not be solved by the formation of subclasses.

Likewise, other potential "conflicts" highlighted by Defendants do not merit the alarm bells Defendants attempt to sound. Defendants argue that class representatives cannot embark on strategies that harm segments of the class in order to increase the likelihood of class certification. Opp. at 93 (citing *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 & n.16 (S.D. N.Y.1982) (criticizing proposed class representatives for arguing choice of law position ultimately rejected by court); *Clay v. American Tobacco Co.*, 188 F.R.D.

483, 493 (S.D. Ill. 1999) (refusing to certify class on ground that proposed class representatives dropped claims which some members of proposed class could have pursued successfully as individuals)). According to Defendants, seeking to invoke the laws of Michigan and Tennessee is a strategy that sells out the class members from states with laws more favorable to plaintiffs. *Id.* The choice of law rules controlling this case dictate that the laws of Michigan and Tennessee apply, and arguing (correctly, in the Court's view) for their application, as Plaintiffs did, cannot defeat class certification. Defendants' other arguments are similarly unavailing. Hence, we conclude that Plaintiffs satisfy the last of the requirements of Rule 23(a).

C. Unavailability of "Hybrid" 23(b)(2)/(b)(3) Certification

Having found that the class certification requirements of Rule 23(a) are met, we now examine whether the criteria set forth in Rule 23(b) are satisfied. Plaintiffs first assert that this case is suitable for class certification as a hybrid "23(b)(2)/(b)(3)" class action.

Certification under Rule 23(b)(2) is appropriate when the class is seeking injunctive or declaratory relief. Seventh Circuit case law also permits "divided certification" under which "[t]he district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages." *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO,* 216 F.3d 577, 581 (7th Cir. 2000). Following our rulings on July 27, 2001, Plaintiffs' remaining claims are for damages under the theories of breach of warranty, violations of consumer protection statutes, and unjust enrichment. *Bridgestone/Firestone,* 155 F. Supp.2d 1069 (dismissing RICO, negligence and redhibition claims; permitting implied and express warranty claims, Magnuson Moss claims, unjust

enrichment claims, and, possibly, consumer protection claims); *In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 153 F. Supp.2d 935 (S.D. Ind. 2001) (dismissing Plaintiffs' claim for injunctive relief insofar as it requests a court-ordered recall, buy back, and/or replacement of the Tires). Plaintiffs maintain that declaratory relief is available because "the Court can find that the Tires and Explorers are dangerous, and implement classwide protective notice, or issue a declaration that Defendants must specify, manufacture and use tires with a safe, alternative design such as a nylon cap." Supp. Memo. in Support at 4. We agree with Defendants' characterization of these claims as little more than a request for a declaration that Defendants are financially responsible. This type of "declaratory" relief does not fit within the parameters of Rule 23(b)(2). *Cf. Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 820 (7th Cir. 2000) (overturning certification of defendant class under 23(b)(2) because, in part, plaintiff was merely seeking "a judgment declaring that a party is entitled to no money."). Hence, there is no portion of the case suitable for certification under Rule 23(b)(2). Moreover, where, as here, Plaintiffs' remaining claims are overwhelmingly claims for damages, Rule 23(b)(3) is the only appropriate potential vehicle for certification. *See Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3)....").

D. Certification Under Rule 23(b)(3)

We now turn to the propriety of class certification under Rule 23(b)(3), which requires that common questions predominate and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.

(1) Predominance

Common questions predominate when they "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil* § 1778. *See Amchem,* 521 U.S. at 591. Here, Plaintiffs must establish that common questions of law[17] or fact predominate with respect to the elements of their warranty, unjust enrichment, and consumer protection claims. We find that Plaintiffs have met this burden.

(a) Predominance of Common Defect Issue

All the surviving theories of relief in the Master Complaint require that Plaintiffs prove that something is wrong with the products at issue. For instance, Plaintiffs argue that Ford violated § 445.903(1)(e) of the MCPA, which prohibits "representing that goods or services are of a particular standard, quality, or grade ... if they are of another." Likewise, Firestone allegedly violated § 47-18-104(a)(7) of the TCPA which prohibits exactly the same behavior. Similarly, Plaintiffs assert that Defendants breached the express and implied warranties they extended to Plaintiffs by selling vehicles and/or Tires that were defective. Plaintiffs' unjust enrichment claim also depends upon proof that the vehicles and/or Tires were defective; in order to prevail on that claim, Plaintiffs must prove that the products Defendants sold were defective and that the prices they were paid for the products were therefore too high. Whether the Tires and/or Explorers are defective is a factual question that Plaintiffs intend to prove using common proof.

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[17] As explained earlier in this opinion, the Court has found that all class members' claims will be governed by the laws of Michigan and Tennessee; hence, as will be explained below, common questions of law predominate.

Firestone argues that the question of defect renders the class not suitable for certification because there are "over 280 distinct tire populations at issue" based on size, model, place of manufacture, failure rate and other factors. For instance, Firestone maintains that "[t]he core tire component—the inner liner—varies among tire designs in thickness and in the number of plies, depending on the needs of each product. The composition of body plies also varies depending on the performance requirements of the tire being produced." Opp. at 20 (citing Gardner Decl. ¶¶ 9-10). In addition, according to Firestone, sidewalls and steel-belt characteristics vary depending on the intended use for the tire model and size. *Id.* at 21.

In opposition, Plaintiffs point to persuasive evidence that Firestone has significantly exaggerated distinctions among the Tires. For example, Robert Martin, a retired Firestone Vice President of Corporate Quality Assurance, testified that differences between 15- inch and 16-inch Tires likely are negligible. Martin Dep. of 11/27/00 at 272. Specifically, he stated:

> The materials that are used in the 15-inch and 16-inch tire, for example, the body ply, was probably the same polyester material. The steel belts could be the same steel. The tread components could be the same. The sidewall compounds could be the same. The inner liner could be the same. Many components could be common.

Other Firestone officials testified similarly regarding other variations claimed by Defendant to be significant. Gregory Bond, foreman of the "B" Crew in the tire room at Firestone's Decatur plant, testified that he would expect the rubber compounds to be the same regardless of whether the Tires were

produced at the Decatur or Wilson plants. Bond Dep. of 6/20/01 at 53.

At the hearing, the parties also discussed a difference between one group of allegedly faulty Tires and another group of allegedly faulty Tires. However, even if this distinction turns out to be significant upon fuller development of the evidence, it hardly furthers Firestone's argument that common issues do not predominate. Beginning in 1995, Firestone undertook a manufacturing cost-reduction program, called "C95." Transcript at 30, 47-48, 145-46. These cost reductions allegedly made the Tires lighter. *Id.* at 30. In addition, at the hearing, Plaintiffs' counsel cited evidence that the accident rate for vehicles with these Tires increased following the implementation of the program. *Id.* at 30-31. Hence, evidence may show that 1995 and later model Tires should be put in a different subclass than 1994 and earlier model Tires, but this distinction is far from constituting the "over 280 distinct tire populations" based on the wide variety of factors propounded by Firestone. As such, we find that Firestone's arguments about the variety of Tires at issue do not defeat Plaintiffs' assertion that defect can be demonstrated (or disproved) by common proof.

With regard to defect, Ford makes an argument similar to that advanced by Firestone. Ford argues that Plaintiffs cannot meet their burden of advancing a defect theory and supporting evidence that is applicable to all Explorers. Opp. at 26. Ford's argument is not persuasive. In fact, Ford itself treated all Explorer models and years the same for many purposes. For instance, before December of 2000, Ford recommended a uniform tire inflation of 26 psi on 15 inch tires on Explorers, regardless of configuration, payload, or equipment. Because tire pressure is critical, in Ford's view, to rollover propensity, this "classwide" treatment is significant. *See* Lee Carr Dep. Ex. 18. Likewise, when serious problems began to appear with Explorers

and Firestone Tires in the Middle East and South America, Ford generally treated Explorers as a class, with little differentiation as to model year or as to whether the vehicle was a four-wheel drive or a two-wheel drive vehicle. A draft of a document dated August 16, 1999 entitled "1995/99 Explorer/Mountaineer P255/70R16 Tire Separation in GCC[18] Countries" refers to Explorers throughout this period as being affected by the problem described as "Rollovers attributed to tire tread separation." Reply Ex. 27, Tab C.[19] In addition, some of the remedial actions considered by Ford were the same across model years. While we recognize that Ford states that the Tires, rather than the vehicles, are responsible for rollover accidents, the Court finds that this similar treatment of all Explorers, regardless of variations Ford now claims are significant, provides common proof to Plaintiffs with which to argue their case.[20] Whether Plaintiffs will succeed on the basis of this common evidence is

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[18] "GCC" stands for Gulf Cooperation Council. Member countries are Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, and the United Arab Emirates. The draft report on tire separation refers to the affected markets as the GCC states and Yemen, Jordan, Lebanon, and Syria. Reply Ex. 27, Tab C.

[19] This document was filed under seal by Plaintiffs on May 17, 2001, because Ford had designated the document "Confidential" as provided by the Court's Confidentiality Order dated March 7, 2001. Ford, however, has not filed a motion requesting that the seal be maintained (as provided in the Court's *nunc pro tunc* Order of March 20, 2001), and the seal has therefore been automatically lifted.

[20] We also note that Ford is not the only entity to group Explorers for the purpose of examining the problems called to its attention. NHTSA concluded that it is appropriate to group Explorers into the following four groups to calculate the static stability factor ("SSF"): 4-wheel drive Explorers, model years 1991-94; 4-wheel drive Explorers, model years 1995-1998; 2-wheel drive Explorers, model years 1991-94; and 2-wheel drive Explorers, model years 1995-98. 66 Fed. Reg. 3413, Table 2. While sub-classing may be necessary at a later point, for now, we find that Plaintiffs offer sufficient classwide proof of Explorer defect to warrant class certification.

not the question before us.

Ford further objects to the certification of an Explorer class on the ground that Plaintiffs must distinguish the Explorer from other makes of similar vehicles because Plaintiffs' theory is that Explorers have an "unreasonable tendency" to roll over. Opp. at 27. In *Walsh v. Ford Motor Co.*, the court explained that "[t]he plaintiffs' burden on remand was to identify reasonably a body of evidence which is common to all of the different Ford vehicles at issue and *which distinguishes the special characteristics* causing [the alleged defect] in Ford vehicles *from comparable non-Ford vehicles.*" 130 F.R.D. 260, 269 (D.D.C. 1990) (emphasis added); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986). Ford argues that the same standard must apply here. According to Defendant, it is not enough that the Explorers be alike; they must also be alike in a way that distinguishes them from peer vehicles. Opp. at 26.

We are not convinced by Ford's argument or by the rule set forth in *Walsh* on which it is based. First, Ford cites no authority for the proposition that showing an "unreasonable" rollover tendency can only be accomplished by demonstrating that the product at issue differs in some way from similar products. Neither the district court in *Walsh* nor the appellate court that established the burden provided the reasoning behind their rule that "unreasonable" must mean "different," and we find that such a proposition runs counter to logic. A defect can be statistically common, but still unreasonable. At the certification hearing, Plaintiffs' counsel stated that "[w]e would never let the Pinto off simply because the Torino blew up too." Transcript at 40. This lawsuit is about whether Ford is at fault for producing defective Explorers, not about whether some other manufacturer is at fault for producing defective vehicles that compete for sales with the Explorer.[21] Second, whether the Ford Explorer exhibits an

[21] Ford, of course, is entitled to defend itself against a finding of

unreasonable tendency to roll over is a merits question, unsuitable for resolution at the class certification stage. At the moment, we are interested only in whether Plaintiffs have demonstrated that they can offer representative proof on this issue. *See Szabo*, 249 F.3d at 676. Demonstrating that all the vehicles encompassed by the class definition share similar characteristics with regard to the alleged defect is sufficient to establish that common issues of material fact predominate.

(b) Predominance of Other Common Issues

While the issue of defect is central to this case, we must examine whether common issues predominate with respect to the other elements of Plaintiffs' claims. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 186-87 (3d Cir. 2001) ("We began our analysis by examining the elements of the underlying cause of action, noting that such an analysis is critically important to the predominance determination under Rule 23(b)(3).").

(i) Consumer Protection Claims

With regard to Plaintiffs' claims under the consumer protection statutes of Tennessee and Michigan, Defendants maintain that the need to establish individual reliance defeats predominance. Supp. Memo. in Opp. at 18-19. Much of Defendants' argument is based on our earlier ruling in which we determined that "[s]hould the Plaintiffs wish to prosecute their suits under the TCPA and MCPA individually, they shall be granted leave to amend the complaint in order to allege individual reliance." *Bridgestone/Firestone*, 155 F. Supp.2d at

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"unreasonable" rollover tendency with evidence of peer vehicles' rollover rates, as well as with any other evidence that tends to refute Plaintiffs' claim of "unreasonableness."

1109. We reasoned that both statutes require "a causal link between the alleged misrepresentation or omission and the injury." *Id.* at 1108. Plaintiffs' rebuttal to Defendants' argument is contained in both the class certification briefing and in the briefs submitted in conjunction with Plaintiff's motion for reconsideration of these portions of the July 27, 2001 Order. We examine this issue with regard to both motions in light of additional briefing on the subject and our finding explained above regarding the availability of the class action mechanism to pursue consumer protection claims.

We examine the Michigan Consumer Protection Act first. In our prior ruling, we noted that "the Supreme Court of Michigan held 'that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations [as long as] ... the class can establish that a reasonable person would have relied on the representations.' " *Bridgestone/Firestone*, 155 F. Supp.2d at 1108-09 (quoting *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987)). We ruled, however, that because Plaintiffs cannot bring a class action under the MCPA on behalf of a nationwide class, they were subject to a different pleading standard set forth in other Michigan cases requiring individual proof that Ford's alleged bad acts caused their injuries. *Id.* at 1109 (citing *Mayhall v. A.P. Pond Co., Inc.*, 341 N.W.2d 268, 270 (Mich. Ct. App. 1983); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999); and Mich. Comp. Law § 445.911(2)). As explained earlier in this ruling, Plaintiffs are permitted to bring a class action under the MCPA. Hence, the procedure set up in *Dix*, through which class plaintiffs can demonstrate reliance based on the inference of what a reasonable person would do, is available to the members of the class proposed here.

Defendant Ford attempts to distinguish *Dix* on the ground that the court did not examine the language of the Michigan

statute. Supp. Opp. at 19 n.17 (citing *Dix*, 415 N.W.2d at 210). As with our recognition that the Tennessee courts, after reading presumably the same text of the TCPA available to us, implicitly interpreted the TCPA so that it does not preclude class actions, we find also that the Supreme Court of Michigan has done the same, interpreting the MCPA to allow proof of reliance based on reasonable inference, at least in class action cases. In *Gilkey v. Central Clearing Co.*, a federal district court in Michigan reached a similar conclusion. 202 F.R.D. 515, 525-26 (E.D. Mich. 2001). There, the court found that the proposed class representative was adequate in an MCPA action despite the defendants' argument that the proposed class representative testified that he did not rely upon the allegedly false disclosures. *Id.* (quoting *Dix*, 415 N.W.2d at 209). The courts in both *Dix* and *Gilkey* reasoned that the Consumer Protection Act should be construed liberally so as "to provide an enlarged remedy for consumers who are mulcted by deceptive business practices" and that because the Act allowed for class actions, recognizing that reliance could be shown on a representative basis was necessary to effectuate the statute's remedial purpose. *Dix*, 415 N.W.2d at 209; *Gilkey*, 202 F.R.D. at 525-26.

Defendant Ford also argues that common representations were at issue in *Dix* but are not crucial to Plaintiff's case here and that, hence, common issues do not predominate with respect to the MCPA. Supp. Memo. in Opp. at 19 n.17. Ford overstates *Dix*. The remainder of the paragraph cited by Ford acknowledges that the misrepresentations may vary a little from plaintiff to plaintiff without defeating class certification. *Dix*, 415 N.W.2d at 210 ("The alleged misrepresentations may differ somewhat from plaintiff to plaintiff, but, if the plaintiffs' allegations are true, they are all substantially similar and are all part of a common scheme."). Furthermore, in *Dix*, material omissions formed another basis for the plaintiffs' claims. *Id.* at 207.

Plaintiffs here can apparently produce both types of evidence

in order to make their case to the jury. Plaintiffs present evidence that Ford engaged in a national advertising campaign to disseminate a common message to all consumers. Examples of these advertisements tout the Explorer's "exceptional control," "smooth ride and excellent handling," and "reputation of high quality, dependability, and trust." Compl. ¶ 124(a)(b)(g) (citing ads in *People*, 12/31/99; *Newsweek*, 12/15/97; *Ebony* 09/95; *Essence* 01/96; and *Black Enterprise* 02/97). Certainly, as Ford points out, other advertisements making different representations about Explorers were placed in local and regional publications by dealers and dealer associations. Scott Aff. ¶ 3. Ford does not dispute that the Explorer was promoted through national advertisements like the ones cited above. Such advertisements, while they lack specificity and may ultimately fail to convince a jury that Ford made misleading representations to customers, do constitute a core of alleged common misrepresentations relevant to Plaintiffs' MCPA claim.

In addition, Plaintiffs also point to common evidence that Ford made material omissions by failing to reveal defects in Explorers about which they contend Ford was aware. For instance, on October 15, 1986, R.J. Bacigalupi, a Ford engineer, sent a memorandum to C.A. White, discussing stability of the Explorer while it was still in development. Plaintiffs' Rebuttal Bench Book, Tab C, Ex. 11.[22] He stated that lowering the vehicle, adding weight low in the vehicle, and widening the track were better alternatives to changes in tire size. *Id.* Mr. Bacigalupi then added, "Cost or timing implications of these kind [sic] of actions tend to stall them in their tracks." At the hearing on class certification, Plaintiffs' counsel highlighted the following quote from a document authored by Roger Stornant, a Ford employee, in late 1989: "I believe that management is aware of the potential

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[22] This document was originally filed under seal, but for the same reasons explained in *supra* note 19, the seal has been lifted.

risk with the P235 tires, and they have accepted the risk." Transcript at 28. If true, we conclude that a jury could find that a reasonable person would have changed his or her purchasing decision if this information had been available, and these omissions buttress our conclusion that common issues predominate as to the MCPA claims.[23]

In our July 27, 2001 Order, we held that, while the TCPA formally does not require plaintiffs to prove reliance, they must "indicate 'how the deceptive act affected the contested trade.' " *Bridgestone/Firestone*, 155 F. Supp.2d at 1109 (quoting

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[23] Ford maintains that common issues also do not predominate with respect to two other elements of an MCPA claim. Defendant argues that individualized inquiries would be needed concerning whether each purported class member bought his or her vehicle "primarily for personal, family, or household purposes." Supp. Opp. at 19 (quoting Mich. Comp. Laws § 445.902(d)). We recognize that, under Michigan case law, whether the class member used his or her vehicle primarily for personal use is an individualized question. *Zine*, 600 N.W.2d at 401. However, such a question is a rather simple one. *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 n.4 (7th Cir. 1974) ("Even if it is necessary to review the contracts individually to eliminate business purchases, ... such a task would be neither hereculean [sic], inhibiting, nor for that matter ... unique.") (internal quotation omitted). Hence, individualized inquiry into consumer or business status does not defeat class certification. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 198 F.R.D. 503, 506 (N.D. Ill. 2001) (certifying class of debtors suing under Fair Debt Collection Practices Act (FDCPA) despite defendants' argument that only consumer debts are covered by the FDCPA and that eliminating business debtors was individualized inquiry); *see also Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981) (while meaning of "predominance" not explained by the rule, the term does not mean that *every single* issue must be common). Ford also argues that each class member would have to prove what his or her expectations were in order to prevail under the MCPA. Supp. Opp. at 19. We find that this issue is so intimately wrapped up in the question of reliance that it too can be demonstrated through the expectations of a reasonable person. *See Dix*, 415 N.W.2d at 209; *cf. Bridgestone/Firestone*, 155 F. Supp.2d at 1109 (considering loss under MCPA as frustrated expectations *after* finding that individual reliance must be shown *in non-class action cases*).

Ganzevoort v. Russell, 1995 WL 623047, at *2-3 (Tenn. Ct. App. Oct. 25, 1995)). Indeed, proximate cause is a required element of claims under the consumer protection statute in Tennessee. *E.g., Harvey v. Ford Motor Credit Co.*, 1999 WL 486894, at *2 (Tenn. Ct. App. July 13, 1999) ("T.C.A. § 47-18-109 establishes a private right of action for any person who suffers an ascertainable loss as a result of the use or employment by another person of an unfair or deceptive act or practice.") (internal quotation omitted). The question presented here concerns the options plaintiffs have for proving proximate causation.

As Firestone properly points out, Plaintiffs cannot claim that common affirmative misrepresentations affected their purchasing decisions. Unlike the situation with the Ford Explorer, the subject Tires were not the focus of a national ad campaign. None of the national tire advertisements in the Master Complaint mentions ATX, ATX II or Wilderness AT tires. Compl. ¶ 127. Most advertising for Firestone tires was done through numerous retailers at the local and regional level and was not subject to much central direction. Pence Declaration ¶ 2, 5. Any representations made to individuals at the time of sale certainly would not be uniform for the millions of class members.

However, it appears that Plaintiffs can produce common evidence of material omissions by Firestone. For instance, Plaintiffs have produced some evidence that officials at Firestone were aware of problems with the Tires long before a recall was announced on August 9, 2000. The Tire Adjustment Data that has been the subject of discovery motions suggests that, in the mid-1990s, Firestone was aware of an increase in belt edge separation and belt-leaving- belt separation in the radial ATX tire. Transcript at 48. Furthermore, a jury could find that Firestone concealed problems with the Explorer in combination with its Tires and that Firestone acquiesced, if not actively participated, in the decision to lower the recommended tire

pressure of the Tires on Ford Explorers, despite awareness that a lower psi would compromise Tire performance. Transcript at 29-30.

On the basis of these alleged omissions, a jury could infer that Firestone concealed information from Plaintiffs that, if known, would have prevented them from purchasing the Tires. Defendants argue that concealment of information cannot constitute proximate cause as required by the TCPA. Opp. to Reconsideration at 14. Defendants base their argument on *Harvey,* 1999 WL 486894, at *2. In *Harvey,* the court dismissed a TCPA claim, rejecting Mr. Harvey's claim that he was "required to pay hidden fees." *Id.* Defendants' interpretation of *Harvey* reads too much into that decision, in our view. The court continued its analysis following the excerpt relied upon by Defendants, noting that although the exact allocation of the payment between dealer and defendant was not revealed to the plaintiff, Mr. Harvey was aware of the overall payment and total interest rate. *Id.* Because the plaintiff did not allege that he would have refused to engage in the transaction had he known that some portion of his payment would go to the dealer and because Mr. Harvey knew the total rate, there was no "hidden fee" at issue to form the basis of the case. *Harvey* cannot prevent a jury from basing its decision on an inference (that information concerning the alleged defect would have had an impact on Plaintiffs' purchasing decisions) common to all class members. Hence, common issues predominate with respect to Plaintiffs' TCPA claims.

(ii) Express Warranty Claims

Plaintiffs' breach of express warranty claims are based upon three distinct theories: written warranties, warranties created by advertising, and warranties created by oral representations made to individual Plaintiffs at the time of sale. The propriety of certifying a class as to each of these theories is discussed in turn

below.

Defendants[24] argue that Plaintiffs' breach of express warranty claims are based upon a wide variety of written warranties that differ in numerous ways: for example, both durational limitations (based on time, mileage, and/or tread wear) and applicable exclusions (e.g. commercial use, negligent use) vary depending upon which Firestone written warranty is applicable to a given Plaintiff. Which written warranty, if any, that each Plaintiff received depends upon when and where that Plaintiff purchased his or her vehicle or Tires. Although Defendants argue that these variations in written warranties will require individualized inquiries into each Plaintiff's purchase and use of the vehicles and Tires, it is unclear to us how the vast majority of these individualized inquiries will be relevant to Plaintiffs' claims. All of the applicable written Firestone warranties provide coverage if the tires "become unusable for any reason within the manufacturer's control" within a given time period, or within a given amount of tread wear on the tire. Under Plaintiffs' express warranty theory, each and every Tire included in the class definition was "unusable" at the moment it was purchased due to a design defect. Therefore, with the exception of the "commercial use" exclusion that may be applicable to some Plaintiffs,[25] none of the exclusions contained in the warranty,

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[24] Defendants jointly make this argument, but only point specifically to the variations in Firestone's written warranties. Perhaps this is because, while Ford's written warranties vary somewhat from model year to model year, we have already determined that the variations are not relevant to the Plaintiffs' claims in this case. *Bridgestone/Firestone,* 155 F. Supp.2d at 1114. All of the warranties contain the provision that Ford's dealers will "repair, replace or adjust all parts (except tires) ... that are defective in factory-supplied materials or workmanship for 3 years or 36,000 miles (whichever occurs first)."

[25] The Court does not view the issue of whether each Plaintiff purchased the Tire for personal or commercial purposes, which for the vast majority of Plaintiffs can be resolved in a simple and straightforward manner, to be sufficient to defeat predominance. *See Simer,* 661 F.2d at 672 (term

which relate to the use (or abuse) of the tire after purchase, would be relevant. Plaintiffs' express written warranty claim against Firestone ultimately will rise or fall depending on whether they, as a group, using classwide proof, are able to prove that all of the Tires were "unusable," as that term is used in the Firestone warranties, at the time of purchase.[26] Similarly, the Plaintiffs' express written warranty claim against Ford ultimately will depend upon whether the Plaintiffs, as a class, are able to prove that all of the Explorers included in the class definition were "defective in factory-supplied materials or workmanship," as that term is used in Ford's written warranties, when they were sold. These common issues predominate the Plaintiffs' claims for breach of express written warranties.

Defendants also argue that individualized proof will be required to support Plaintiffs' claim that the durational limits contained in the applicable written warranties are unconscionable, manifestly unreasonable, fail of their essential purpose, and therefore are unenforceable.[27] The Plaintiffs' claim, however, is that the durational limits in the written warranties were rendered unenforceable because each Defendant knew its product was defective at the time it extended the warranty to each Plaintiff and actively concealed the defect from the Plaintiffs (and everyone else), so that the Plaintiffs were unable to enforce their warranties within the time limit provided. This

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"predominance" does not mean that *every single* issue must be common).

[26] As discussed below, claims for property damage (including to the tire itself) based upon a tread separation or other outward failure of a Tire are not appropriate for class certification, precisely because of the highly individual questions regarding whether the failure was caused by a defect in the Tire or something else, such as the types of misuse which may be excluded under some of Firestone's written warranties.

[27] This argument is also applicable to the Plaintiffs' breach of implied warranty claim.

claim therefore will succeed or fail based upon proof of the Defendants' conduct and knowledge, which will be applicable to the class as a whole.[28]

Defendants further argue that, under both Tennessee and Michigan law, in order to prevail on the breach of express warranty claims, each individual Plaintiff will have to prove that he or she relied upon the terms in the warranty when deciding to purchase the vehicle or Tires. As far as the Defendants' written warranties are concerned, the Court disagrees. The relevant U.C.C. provision, U.C.C. § 2-313(1)(a),[29] does not require a showing of reliance by the buyer; rather, it provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[30] Defendants have cited no case

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[28] The Defendants argue that, even under the Plaintiffs' theory, their knowledge regarding the alleged defects changed over time, and that what they knew and when they knew it will be relevant to whether the exclusions in each particular Plaintiff's warranty was unconscionable at the time of purchase. The questions of what each Defendant knew and when, and the relationship of that knowledge to the unconscionability issue, will certainly have to be answered. However, the answers to those questions will apply to all of the Plaintiffs, and once it is determined whether, and at what point, the warranty exclusions became unconscionable in light of the Defendants' knowledge and actions, it will be a simple matter to determine on which side of that line a Plaintiff's purchase falls.

[29] The relevant state statutes, Mich. Comp. Laws § 440.2313 and Tenn. Code. Ann. § 47-2-313, are substantively identical to the U.C.C. provision.

[30] Ford cites to *Monte v. Toyota Motor Corp.*, 2001 WL 1152901 (Mich. Ct. App. Sept.28, 2001), for the general proposition that, under Michigan law, reliance is an element of an express warranty claim. The court in *Monte* held that the plaintiff could not base an express warranty claim on descriptions of his vehicle's Supplemental Restraint System contained in the Owner's Manual and Owner's Guide because the plaintiff received those documents "after the bargain was already struck" and therefore could not have relied on any

in which a court has ruled that an express written warranty provided to a consumer upon the purchase of a product was unenforceable by the consumer because it was not part of the basis of the bargain.[31] Whether the consumer was aware of the terms of the written warranty before the purchase or not, it was certainly part of the bargain, in that the warranty was part of what the seller sold to the buyer.[32]

The official comments to U.C.C. § 2-313 support this holding. Official Comment 7 provides:

> The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract.

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statements therein. The court cited no authority for this holding, and did not discuss whether it believed that reliance was synonymous with the U.C.C.'s "basis of the bargain" requirement. The court also did not address the official comments to the U.C.C., discussed below, which address the creation of express warranties via post-sale statements. In any event, we are not bound by this unpublished decision, *see* Mich. Ct. R. 7.215 ("An unpublished opinion is not precedentially binding under the rule of stare decisis."), and in light of its conclusory nature, we do not find it persuasive precedent.

[31] Indeed, such an interpretation of the law "would, in effect, render almost all consumer warranties an absolute nullity," inasmuch as it is common practice for warranty booklets to be provided to consumers inside the sealed box in which a product is packaged, or, in the case of vehicles, in the glove box of a new car upon delivery. *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 531 (N.Y. App. Div.1992).

[32] As discussed above, Defendants themselves rely upon the durational limitations contained in their written warranties; Defendants cannot seriously suggest that the terms of the written warranties favorable to them are enforceable, while the terms favorable to the Plaintiffs are not enforceable.

A buyer certainly cannot prove that she relied upon an affirmation made after the closing of the deal in deciding whether to consummate the deal; however, the U.C.C. clearly contemplates that such post-sale affirmations can be enforced as warranties, as long as they "are fairly to be regarded as part of the contract." *See Murphy,* 582 N.Y.S.2d at 531 (holding that written warranty given to plaintiffs at time of delivery of motor home, after purchase price had been paid, was part of basis of bargain). Accordingly, we determine that Plaintiffs need not demonstrate reliance on the written warranties in order to enforce the terms of those written warranties against Defendants, and, further, no individual proof that the written warranties received by Plaintiffs (or, more likely, a subclass of Plaintiffs) were part of the basis of each Plaintiff's bargain will be required.

The same is not true of Plaintiffs' express warranty claim based upon the Defendants' advertising, however. Even assuming that Plaintiffs will be able to demonstrate that each Defendant conducted extensive, nationwide advertising campaigns about its respective products, and that those advertising campaigns contained statements sufficiently specific to create a warranty that the products were safe, or that the products had some other quality they did not actually have,[33] the existence of such advertising, is not sufficient, in and of itself, to demonstrate that the statements in the ads were part of the basis of the bargain when each Plaintiff purchased his or her Tires or Explorers. Unlike a written warranty given to a consumer as part of that individual consumer's purchase transaction, advertisements are simply put out for public consumption by a

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[33] As discussed in the above section on the elements of consumer protection act claims, with regard to Firestone, this assumption is unwarranted. ATX, ATX II, and Wilderness AT tires were not promoted through national ad campaigns. As to Ford, we note again the lack of specificity in most of the ads cited by Plaintiffs.

company in the hopes that they will be seen (or heard) and considered by potential buyers, who will then be induced to become actual buyers, in whole or in part because of the advertisements. For some Plaintiffs, the advertisements likely were successful, and those Plaintiffs may well demonstrate that statements in Defendants' ads were part of the basis of their bargain. For other Plaintiffs, however, this will not be the case, and those Plaintiffs will not have a breach of warranty claim based upon Defendants' advertising. *See, e.g., Masters v. Rishton,* 863 S.W.2d 702, 706 (Tenn. Ct. App. 1992) (breach of express warranty not available to plaintiff who had never seen any advertisements for or heard any representations about the safety of the product at issue); *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 370 (E.D. Mich. 1977) ("It is clear that advertisements and promotional literature can be a part of the basis of the bargain where they are prepared and furnished by a seller to induce purchase of its product and the buyer relies on the representations."); *Omega Engineering, Inc. v. Eastman Kodak Co.,* 30 F. Supp.2d 226, 246 (D. Conn. 1998) ("While advertisements can be part of the basis of the bargain, the plaintiff must show, at a minimum that he or his agent knew of and relied on the statement.") (citing 1 J. Wright & R. Summers, *Uniform Commercial Code* § 9-5, at 494-95 (1995)); *American Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 436-37 (Tex. 1997) (plaintiff could not prevail on express warranty claim based on advertisements when he could not show that he saw or relied upon the defendant's advertisements).

While the Court need not, and thus will not, delve into the issue of precisely what type of proof would be required for a Plaintiff to prevail on an express-warranty-created-by-advertising claim, it is clear that the claim cannot be established by classwide proof. Rather, an examination of each Plaintiffs' exposure to, and consideration of, Defendants' various ads would be required. It is also clear that this inquiry will not fall into the

same simple and straightforward category as proof of when and from whom a class member purchased the Tires and/or Explorer; rather, it almost certainly will require credibility determinations and other individual, unwieldy factual and legal determinations. We determine that these substantial individual issues preclude a finding that common issues will predominate in the resolution of Plaintiffs' claim for breach of express warranty based upon advertising, and therefore we decline to certify classes as to that claim.

For the same reasons that Plaintiffs' advertising-related warranty claims are not amenable to class certification, to the extent that some Plaintiffs assert express warranty claims based upon oral representations made to them at the time of sale, those claims clearly are not common to the class as a whole, and therefore are not appropriate for class certification. Accordingly, no classes are certified as to those claims.

(iii) Implied Warranty Claims

As discussed above, the issue of product design defect is common to all Plaintiffs' breach of implied warranty claims. Under Plaintiffs' theory, the defects in the Explorer and the Tires rendered them unmerchantable at the time of sale, and therefore Defendants are liable for breach of the implied warranty of merchantability. This common issue undoubtedly predominates the Plaintiffs' breach of implied warranty claims.

Defendants argue, however, that the requirement of predominance is nevertheless defeated because Plaintiffs will be unable to use classwide proof to demonstrate privity between each Plaintiff and Defendants. As for Ford, this argument is entirely unavailing, inasmuch as privity is not required for breach of implied warranty actions under Michigan law. *See Jennings v. Southwood*, 521 N.W.2d 230, 234 n.5 (Mich. 1994)

(noting that the Michigan Supreme Court eliminated the privity requirement in actions for breach of implied warranty) (citing *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958)); *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800, 804 (Mich. Ct. App. 1970) (holding, after extensive discussion, that Michigan law does not require privity in breach of implied warranty action, even if only economic loss is involved), cited with approval in *Greenfield Die & Mfg. Corp. v. John H. Powers, Inc.*, 2000 WL 33413347, at *1 (Mich. Ct. App. Aug. 1, 2000) ("[P]rivity of contract is not required in order for a plaintiff to maintain an action for breach of warranty under the UCC. This rule applies even where, as here, the loss claimed is purely economic.") (citations omitted); and *Sullivan Indus., Inc. v. Double Seal Glass Co., Inc.*, 480 N.W.2d 623, 628-29 (Mich. Ct. App. 1991) (same); *but see Downriver Internists v. Harris Corp.*, 929 F.2d 1147, 1149 (6th Cir.1991) (stating that Michigan has abolished the privity requirement only as to warranty cases based on personal injury, and not as to "breach of contract action[s] for economic losses").[34] As the court in *Cova* explained, Michigan courts have determined that "[o]n principle the manufacturer should be required to stand behind his defectively-manufactured product and held to be accountable to the end user even though the product caused neither accident nor personal injury. The remote seller should not be insulated from direct liability where he has merely mulcted the consumer." *Cova*, 182 N.W.2d at 804.

As for the implied warranty claims against Firestone, Plaintiffs correctly concede that privity is required under Tennessee law where no personal injury or property damage is

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[34] We note that both *Downriver Internists* and the case cited therein, *National Sand, Inc. v. Nagel Const., Inc.*, 451 N.W.2d 618 (Mich. Ct. App. 1990), involved commercial, not consumer, transactions. Indeed, the *National Sand* case did not involve a warranty claim at all.

involved. Therefore, it will be necessary to determine whether each Plaintiff satisfies the privity requirement in order for that Plaintiff to succeed on the breach of implied warranty claim. This fact alone does not make class certification improper, however. Each Plaintiff obviously will have to prove that he or she owned or leased a vehicle with one of the types of Firestone tires included in the class definition. For purposes of establishing privity, each Plaintiff will also have to prove from whom he or she purchased the relevant Tires, which seems to the Court to add little, if any, additional burden, either on the parties or on the ultimate fact finder. The universe of sellers from whom the Plaintiffs' Tires were purchased can then be divided into categories, and, if necessary, the class can be divided into subclasses.[35] The question of privity can then be examined as to each category or subclass. For example, those Plaintiffs who purchased their Tires from a private individual—for example, as part of the purchase of a used Explorer or other vehicle—clearly will not be in privity with Firestone, and all Plaintiffs who fall into that subclass likely will not have a viable breach of implied warranty claim against Firestone. More complex factual and legal issues such as agency may be involved in determining whether those Plaintiffs who purchased their Tires as original equipment on a Ford Explorer from a Ford dealership, or as replacement tires from a Firestone dealer, or from an independent retailer like Sears or Wal-Mart, are in privity with Firestone. However, Plaintiffs assert, and Defendants do not genuinely dispute, that these types of sellers also can be divided into discrete subclasses based upon the sellers' relationship, if any, with Firestone.[36] The issue of privity then can be determined

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[35] The Court contemplates that the necessity for, and the definitions of, any such subclasses will be clarified as a result of discovery, summary judgment procedures, and/or the stipulations of the parties.

[36] The use of these subclasses also can address Defendants' concern that each Plaintiff will have to demonstrate "whether the tires or Explorers were purchased in a manner in which a written warranty from Firestone or Ford

as to all of the Plaintiffs within each subclass. Plaintiffs would thus be able to prove privity with Firestone, if at all, by classwide, not individual, proof. Accordingly, the privity requirement under Tennessee law does not defeat predominance in this case.[37]

(iv) Unjust Enrichment Claims

As an alternative to their breach of express warranty claims, Plaintiffs have asserted an unjust enrichment claim against Defendants. In order to prevail on their unjust enrichment claim, under either Tennessee or Michigan law, Plaintiffs will have to demonstrate that (1) Ford and/or Firestone received a benefit at the expense of the Plaintiffs and (2) it would be inequitable or unjust for Ford and/or Firestone to retain that benefit. *See Michigan Educ. Employees Mut. Ins. Co. v. Morris*, 596 N.W.2d 142, 151 (Mich. 1999); *Newton v. Cox*, 954 S.W.2d 746, 748 (Tenn. Ct. App. 1997). Plaintiffs allege that Defendants were unjustly enriched by selling defective Explorers and Tires for the price of non-defective Explorers and Tires. In other words, the wholesale price the Defendants received for their defective

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might attach." Defendants' Opposition at 55. Defendants' own phrasing of this issue demonstrates that the question of whether an individual Plaintiff received a written warranty from Ford or Firestone—and indeed what the terms of the written warranty were—will be answered by looking at where (or from whom) and when the Plaintiff purchased the vehicle or Tires.

[37] In its Response to Plaintiffs' Bench Book Filing at 30, Ford also argues that, as to the breach of implied warranty claims, "another significant, highly individualized issue is what each putative class member did after discovering the defect and the related issue of when he/she supposedly made the discovery." While, as the Michigan cases cited by Ford suggest, these issues may be relevant in tort-based product liability claims (because they are relevant to the issues of contributory negligence or assumed risk) they are entirely irrelevant to the contract-based breach of warranty claims involved in this case.

products was too high. Obviously, this claim, like the warranty claims, depends primarily upon a showing of defect, a classwide issue. The amount of excess revenue received by Defendants, if any, will also be demonstrated by classwide, expert testimony, and will be calculated on a per vehicle, rather than a per Plaintiff, basis.[38] The amount of the excess revenue to which each Plaintiff is entitled will, under Plaintiffs' theory, be determined by an apportionment process, which will depend upon evidence of when and from whom each Plaintiff purchased the vehicle or Tires.[39] However, as we have stated before, those straightforward factual questions are not the type of individual issues that defeat a finding of predominance. Rather, the predominant issues relevant to Plaintiffs' unjust enrichment claim are those common to all Plaintiffs—whether the Explorer and the Tires were defective at the time of sale and whether because of that defect Defendants received excess (i.e. unjust) revenues from their sale.

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[38] Defendants also argue that predominance is defeated to the extent that Plaintiffs seek recovery for a diminution of the resale value of their Explorers. However, the Court does not understand the Plaintiffs to be seeking such damages, given the claims remaining in the case. (We understand their claim to be for diminished value at the time of the sale.) *See* Transcript at 65 ("Warranty claims, the unjust enrichment, the potential claims for consumer trade practices, all involve the defendant's [sic] misconduct at the time they had sold a new vehicle. Therefore, they all relate to the overpayment for a new vehicle.") (statement by Plaintiffs' counsel).

[39] Defendants suggest that the retail price paid by each Plaintiff, not the wholesale price received by Defendants, is the relevant inquiry. The Court disagrees. The relevant inquiry under Plaintiffs' theory will be the amount Defendants inequitably earned from the sale of defective Explorers and Tires. If Plaintiffs are to prevail on their unjust enrichment claim, it will have to be on the basis of expert testimony that will demonstrate the amount per vehicle and/or Tire by which the price Defendants received exceeded the price they should have received, given the defects in the Explorers and Tires. This expert testimony will apply classwide, and will not depend upon the amount each Plaintiff actually paid for the product.

(v) Property Damage Claims

As we noted in our November 28, 2001 Order, the Court denies the Plaintiffs' motion to certify a subclass of persons who have sustained property damage as a result of a tread separation incident. Although we have found that Plaintiffs can pursue their other claims on a classwide basis, the nature of the proposed property damage claims will differ significantly. It will be necessary for each individual class member to prove (1) that the defect caused his or her tread separation incident, (2) that the claimed property damages were caused by his or her tread separation incident, and (3) that the damages warrant a particular, individual monetary award. Common issues would not predominate in a trial of these claims.[40] Certification of a property damage subclass is therefore denied.[41]

(2) Superiority

Rule 23(b)(3) also requires Plaintiffs to establish that a class action would be the "superior" manner in which to resolve the controversy. Four factors are to be considered:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any

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[40] Moreover, it is more difficult to conclude that class treatment of these claims is otherwise a superior method of adjudication. If a class member's property damage is significant, maintenance of an individual action is more likely to be economically feasible.

[41] Denial of certification will not, however, exclude persons who have incurred property damage from the Tire Class definition. These persons, unless they opt out of the class to pursue their claims on an individual basis, will be treated as Tire owners and will be entitled to recover to the same extent as other Tire owners, but they will not recover for property damage resulting from alleged Tire failures.

> litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

We address these factors in order. Prior to the consolidation of this matter in MDL proceedings and to the filing of the Master Complaint, a number of similar class actions had been filed in various courts.[42] In contrast, neither Defendants nor Plaintiffs have called our attention to the filing of any individual suits seeking damages for breach of warranty, unjust enrichment, or consumer protection act violations. Hence, there appears to be little interest in individual control of this action, and the first factor is therefore satisfied. *O'Brien v. Encotech Construction Services, Inc.*, 203 F.R.D. 346, 351-52 (N.D. Ill. 2001) ("[T]he court in this case has not been informed by either party of any pending suits brought by individual class members ... and thus ... there does not appear to be an interest in controlling the prosecution of the state claims.") (internal quotations omitted).

The second factor—the extent and nature of litigation already pending—militates in favor of certification. Because this MDL has consolidated proceedings against Ford, Firestone, and Bridgestone arising out of allegedly faulty Tires and Explorers, "the extent and nature of any litigation concerning the

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[42] *See, e.g., Spied v. Bridgestone/Firestone, Inc., et al.*, IP 00-5035-C-B/S (now pending in the MDL); *Davison v. Bridgestone/Firestone, Inc., et al.*, IP 00-5052-C-B/S (same); *Grant v. Bridgestone/Firestone, Inc., et al.*, Case No. 009-3668 (Pa. Ct. Cm. Pl.) (pending in Pennsylvania state court); *Burkes v. Bridgestone/ Firestone, Inc., et al.*, No. 00-026711 CZ (Wayne County Cir. Ct.) (pending in Michigan state court).

controversy already commenced by ... members of the class" is limited. The filing of the Master Complaint consolidated most of the then-existing federal class action cases. State class action lawsuits remain pending, but neither side suggests this development as a reason to deny certification here.[43]

The third factor—the desirability of concentrating the litigation in a particular forum—favors certification. We are aware that MDL consolidation, in and of itself, does not satisfy this condition. Instead, the question to be examined is whether the "concentrat[ion] of the litigation of the claims in the particular forum" should take the form of class certification. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234- 35 (9th Cir. 1996) (superiority of class certification not a foregone conclusion by virtue of multidistrict consolidation for pretrial

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[43] Firestone argues that the absence of any individual lawsuits by proposed class members demonstrates that certification here would create a "judicial 'nightmare of a class action,' " when the Tires of all such Plaintiffs "have performed perfectly [and therefore, Plaintiffs] have not been hurt by Firestone." Firestone Supp. Reply in Opp. at 11 (quoting *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001)). Our response to this argument is two-fold. First, assuming Firestone's familiarity with our earlier ruling on the motion to dismiss, Firestone apparently does not argue that Plaintiffs do not make a colorable claim of loss in the surviving causes of action. *See Bridgestone/Firestone*, 155 F. Supp.2d at 1099 (explaining that under implied warranty of merchantability, for example, Plaintiffs can suffer actionable loss absent injury to property or person). Instead, Firestone must be arguing (no more appropriately) that Plaintiffs ultimately will not succeed on the merits of their claim. *Rahim v. Sheahan*, 2001 WL 1263493, at *10 (N.D. Ill. 2001) (at class certification stage, "focus [is not] the substantive strength or weakness of the plaintiffs' claims ...") (interpreting *Szabo* and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). Second, Firestone's argument is not connected to the aim of this subsection of Rule 23. Courts generally look at the progress of litigation in other courts so as to avoid inconsistent results and duplication of effort. *Cf. Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 838 (7th Cir. 1999) (comparing progress of *Blair* litigation to overlapping class action before another judge as part of process of determining whether *Blair* class action was "superior vehicle").

proceedings). We find that it should. In our view, class certification is the most appropriate means of continuing this litigation. As Plaintiffs note, without class certification, if individual Plaintiffs wish to continue pursuing their claims,[44] either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. Supp. Memo. in Support at 19. Such a result would be immensely burdensome to the courts, parties, and witnesses. This would also create the risk of inconsistent results. And while these multitudinous lawsuits are clogging the courts, other litigants must wait and wait and wait. Thus, this factor clearly supports class certification.

The key factor in the superiority inquiry for this case, however, is the last criterion listed in Rule 23—manageability. Defendants' most strenuous objection to manageability is Plaintiffs' alleged failure to propose a workable trial plan. Opp. at 69-71; Firestone's Memo. in Resp. to Bench Book at 25-27. Defendants maintain that myriad individual issues preclude even the possibility of a workable trial plan. *E.g.*, Firestone's Supp. Reply in Opp. at 10 (more than two hundred tire populations for which individualized questions exist). As explained in the discussion of predominance, the individual issues in this case are not nearly as daunting as Defendants claim. Also, as discussed earlier, subclassing is available if certain factual distinctions appear material after fuller development of the facts. Defendants, of course, object to using subclasses as a solution to this potential issue, claiming that the sheer number of subclasses

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[44] We anticipate, of course, that most Plaintiffs would drop their claims. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. The class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quoting *Mace*, 109 F.3d at 344).

would render the class action unmanageable. *E.g.*, Opp. at 72. We are not dissuaded by this argument, however. Most of the distinctions to which Defendants refer are completely immaterial and therefore will not create the need for subclasses.[45] As noted above, legally relevant distinctions (including, for example, privity in connection with the implied warranty claims under Tennessee law) can be managed through subclassing, a procedure that commends itself in practical terms and is specifically authorized by Rule 23(c)(4)(B). *See also Williams v. Chartwell Financial Services, Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) ("The fact that Rule 23 provides for subclasses when they are efficient makes it clear that the existence of multiple subclasses, in and of itself, is not sufficient to justify the district court's denial of class certification.").

Also, contrary to Defendants' argument, Plaintiffs have succeeded in painting a picture of the proposed trial that satisfies Rule 23. Plaintiffs' Bench Book, Ex. Q (Class Trial Structure); Plaintiffs' Rebuttal Bench Book, Ex. M (Declaration of Elizabeth J. Cabraser Re: Class Action Trial Plan/Trial Structure). In this trial plan, as in the trial plan for a hypothetical individual action on these claims, certain claims (such as consumer protection and warranty claims) will be tried to the jury and other claims (unjust enrichment) will be tried to the Court. *Id.* Defendant Firestone objects, stating, "It is not sufficient to say, for example, that unjust enrichment claims can be tried to the Court. To prevail on their class motion, plaintiffs would have had to explain how

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[45] Due to our earlier choice of law decision, reaffirmed here today, this case does not involve the numerous subclasses on the basis of state law variation that plague the pursuit of class certification in many cases. *See, e.g., In re Ford Motor Co. Ignition Switch Products Liability Litig.*, 174 F.R.D. 332, 352 (D. N.J. 1997) ("As things now stand, it is apparent that appropriate adjudication of the issues in the MDL case would require an unduly large number of subclasses that would divide up the plaintiffs by, among other factors, vehicle model, model year, *and the law that governs their claims.*").

those claims could be proved, and defended, on a classwide basis, without hopelessly bogging down in unmanageable individual issues . . ." Firestone's Resp. to Bench Book at 26. We agree in principle, but this concern is the same as Defendants' argument on predominance, and we have addressed it above. Common proof constitutes the focus of evidence on unjust enrichment and other claims.[46] To round out the metaphor, Plaintiffs' "picture" is admittedly grand in scope, and quite ambitious; however, it is recognizable as a conventional trial construct, rather than as a surrealist exercise.

Likewise, the trial plan satisfies the requirements of due process and the Seventh Amendment. Defendants argue that the class trial would be so bewildering to any jury that it would violate the due process rights of Defendants and absent class members. Supp. Memo. in Opp. at 17. Alternatively, according to Defendants, the use of multiple juries to adjudicate these complex claims would violate the Seventh Amendment "right to have juriable issues determined by the first jury impaneled to

---

[46] Firestone also objects to the trial plan because it would involve bifurcation or "multifurcation," according to Firestone's view. Firestone's Resp. to Bench Book at 26. Firestone is correct to note that bifurcation would be necessary for any claims on behalf of a property damage class. Even Plaintiffs admit that the Court would need to "bifurcate any eventual trial ... between a liability phase common to all of the subclasses and an individual damages phase for each [individual] property damage subclass member." Memo. in Support at 45 n.26. However, we determined above that there will be no property damage subclass because common issues do not predominate for that subclass. The "multifurcation" to which Firestone refers consists of "separate trials for liability, for collective damages, for punitive damages from Firestone, [and] for exemplary damages from Ford." Firestone's Resp. to Bench Book at 26. Multiple "trials" on these issues are no more needed here than they would be for a hypothetical individual plaintiff pursuing all of these claims against both Ford and Firestone. In any event, bifurcation, if ultimately necessary, is permitted. *See Rhone-Poulenc,* 51 F.3d at 1303 ("[Seventh Amendment problems do] not arise when the same jury is to try successive phases of the litigation.").

hear them . . . , and not reexamined by another finder of fact." Opp. at 73-74 (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.1995)). In response, we note that juries are often faced with the responsibility to make difficult and complex decisions, yet they manage to perform admirably. We have no doubt that the jury impaneled in this case will sift through the jury instructions and evidence with full competence.[47] Furthermore, the cases cited by Defendants on this issue do not support their position. Opp. at 72 n.80. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993), *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993), and *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), were all personal injury cases, not class actions. In contrast, as we found above, common issues make up the bulk of the case, thus limiting the complexity Defendants have attempted to magnify.

Finally, Defendants argue that there are other, "superior" methods for resolving this controversy. First, they contend that continued MDL treatment, absent class certification, will significantly advance the litigation. Supp. Memo. in Opp. at 17. Obviously, however, MDL treatment can take a dispute only so far. The authorizing statute, 28 U.S.C. § 1407, allows that civil actions "may be transferred to any district for coordinated or consolidated *pretrial proceedings*." (emphasis added). Certainly, coordinated discovery and consideration of pretrial motions has been efficient so far and hopefully will continue to be, but multidistrict litigation alone is not the "superior method for the fair and efficient adjudication of the controversy." *See* Fed.R.Civ.P. 23(b)(3). Second, according to Defendants, the NHTSA process for investigating and remedying consumer complaints and alleged safety-related vehicle defects is superior

[47] Defendants' Seventh Amendment argument has no application to a case tried to a single jury.

to the class action mechanism. Opp. at 75. While we recognize the role that NHTSA plays in promoting highway safety, we also are aware that the remedies available to NHTSA are not the same as those available through the judicial process. *See In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 153 F. Supp.2d 935 (S.D. Ind. 2001). Courts should not cede their proper role to an administrative agency.

CONCLUSION

For the reasons explained above, Defendants' Motions to Reconsider our November 28, 2001 Order Certifying Classes is *DENIED.* The Court also *DENIES* Ford's Motion for Reconsideration of the Court's Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint. For similar reasons, Firestone's Motion for 28 U.S.C. § 1292 Certification of the July 27, 2001 Order is *DENIED.* Finally, Plaintiffs' Motion for Reconsideration of Ruling on the Scope of the TCPA/MCPA in July 27 Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint is *GRANTED.*

Further, it is ordered that Plaintiffs submit for approval by January 16, 2002, the proposed notice to class members and tender therewith their proposed method and schedule for disseminating said notice.

It is so ORDERED this 31st day of December 2001.

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copy to:

William E. Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
PO Box 1317
Indianapolis, IN 46206-1317

Daniel P. Byron
McHale Cook & Welch
320 N Meridian St
1100 Chamber of Commerce Building
Indianapolis, IN 42604

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re BRIDGESTONE/ FIRESTONE, INC. TIRES PRODUCTS LIABILITY LITIGATION,	)	IP 00-9373-C-B/S MDL No. 1373
THIS DOCUMENT RELATES TO ALL THE ACTIONS, Defendant.	)	(centralized before Hon. Sarah Evans Barker).

ORDER CERTIFYING CLASSES

Having held the hearing on class certification and having notified the parties that a ruling will issue by the end of the year, the Court rules on Plaintiffs' Motion for Class Certification at this time in aid of its jurisdiction.[1] The Court GRANTS in part and DENIES in part Plaintiff's motion. An order setting forth in full the Court's analysis of the parties' arguments on this issue

[1] It has come to our attention that a request is pending before the Circuit Court of Greenville County of South Carolina to certify a class of South Carolina owners of Explorers equipped with Firestone tires which may be ruled upon imminently.

will follow shortly. Time for appeal under Federal Rule of Civil Procedure 23(f) will begin to run on the date of the entry of the latter order or, assuming the timely filing of the motion to reconsider, on the date of a ruling on a motion to reconsider our ruling. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) ("We hold that a motion for reconsideration filed within ten days of 'an order of a district court granting or denying class action certification' defers the time for appeal until after the district judge has disposed of the motion."). Notice to the class shall be deferred until a the final order on these issues from the Court.

The Court certifies the following classes and sub-class:

EXPLORER CLASS:

All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 (the "Current Explorer Owner subclass") or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 (the "Former Explorer Owner classes").

Explorer Sub-Class:

All current residents of the United States who purchased, owned, or leased, at any time from 1990 to the present, Ford Explorers, model years 1991 through 2001, that are or were equipped with Tires (as defined below).

TIRE CLASS:

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX,

ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar[2] to Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja and Wilderness tires ("Tires").

The Court denies Plaintiffs' motion insofar as it asks for certification of a class consisting of "all current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires that failed, resulting in property damage."

It is so ORDERED this 28th day of November 2001.

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copy to:

Irwin B. Levin
Cohen & Malad
136 North Delaware Street
PO Box 627
Indianapolis, IN 46204

[2] This definition incorporates the subclasses in paragraphs 1-6 of Plaintiff's Class Structure/Class Definition, filed on November 16, 2001.

Daniel Byron
McHale Cook & Welch
320 N. Meridian Street, Suite 1100
Indianapolis, IN 46204

William E. Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
PO Box 1317
Indianapolis, IN 46206-1317

Randall Riggs
Locke Reynolds LLP
201 N. Illinois St., Suite 1000
PO Box 44961
Indianapolis, IN 46244-0961

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illnois 60604

June 5, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge.

Nos. 02-1437, 02-1438 & 02-1439

In the Matter of:	)	
BRIDGESTONE/	)	**Appeals from the**
FIRESTONE, INC.,	)	**United States**
TIRES PRODUCTS	)	**District Court for**
LIABILITY	)	**the Southern District**
LITIGATION	)	**of Indiana,**
	)	**Indianapolis**
	)	**Division**
	)	
Appeals of:	)	**No. IP 00-9373-C-**
BRIDGESTONE	)	**B/S**
FIRESTONE, INC.	)	**(MDL No. 1373)**
BRIDGESTONE	)	**Sarah Evans**
CORPORATION,	)	**Barker, *Judge.***
AND FORD	)	
MOTOR	)	
COMPANY	)	

Order

Appellee Class Plaintiffs filed a petition for rehearing and rehearing en banc on May 7, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc. * and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Chief Judge Flaum and Judge Rovner took no part in the consideration of the petition for rehearing en banc.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/ FIRESTONE, INC., ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	)	Master File No. IP 00-9373-C-B/S MDL No. 1373 (centralized before Hon. Sarah Evans Barker)
THIS DOCUMENT RELATES TO THE MASTER COMPLAINT	)	

CLASS STRUCTURE/CLASS DEFINITION

EXPLORER CLASS:

All current residents of the United States who either (a) owned or leased a 1991 through 2001 model year Ford Explorer as of August 9, 2000 (the "Current Explorer Owner subclass") or (b) owned or leased a 1991 through 2001 model year Ford Explorer prior to August 9, 2000 (the "Former Explorer Owner classes").

Source: Master Complaint ¶ 161

TIRE CLASS:

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles that are or were equipped with Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires; all tires that are the same as Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja, and Wilderness tires but sold by Firestone under other brand names; and all other tires manufactured by Firestone that are the same or are substantially similar to Firestone ATX, ATX II, Firehawk ATX, ATX 23 Degree, Widetrack Radial Baja and Wilderness tires ("Tires").

Source: May 8, 2000 Letter from NHTSA to Robert J. Wyant, V.P. Bridgestone/Firestone, Inc.; Master Complaint ¶ 136

TIRE SUBCLASSES

1. August 2000 Firestone Recall Tires Subclass

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires subject to the August 9 Recall (Ex. A).

Source: Master Complaint ¶ 137(a); Firestone Recall

2. **NHTSA September 2000 Consumer Advisory Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to present, vehicles equipped with Tires subject to NHTSA's September 1, 2000 Consumer Advisory (Ex. B).

Source: Master Complaint ¶137(b);
NHTSA September 1, 2000 Consumer Advisory

3. **Ford Summer 2001 Owner Notification Program Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to present, vehicles equipped with Tires subject to Ford's Summer 2001 Owner Notification Program (Ex. C).

Source: Ford Owner Notification Program

4. **October 2001 NHTSA Recall Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires subject to NHTSA's October 4, 2001 Recall (Ex. D).

Source: NHTSA October 4, 2001
Engineering Analysis Report
and Initial Decision

5. **Other Common Green Tires Subclass**

All current resident of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires not part of the Subclasses 1 through 4, that Firestone has identified as "common green" ("common build and cure") to those Tires. The term "common green" means tires that are

produced to the same internal specifications, but which may be molded to different external characteristics and sold under different model designations. (Ex. E).

Source: Firestone Documents Responsive to NHTSA May 8, 2000 Request; Declaration of Gary L. Liberson (Firestone Expert); ¶ 3 & Ex. A; March 2001 Tire Preservation Order

6. **Wilderness HT Tires Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Wilderness HT Tires.

Source: Declaration of Gary L. Liberson (Firestone Expert); ¶ 3 & Ex. A

7. **Property Damage Subclass**

All current residents of the United States who owned or leased at any time from 1990 to the present, vehicles equipped with Tires that failed, resulting in property damage.

Source: Master Complaint, ¶ 137(d)

8. **Explorer Subclass**

All current residents of the United States who purchased, owned, or leased, at any time from 1990 to the present, Ford Explorers, model years 1991 through 2001, that are or were equipped with Tires.

Source: Master Complaint, ¶ 137(e)

APPENDIX F

LIST OF INDIVIDUAL PETITIONERS

Marc Albanese
Jan Atkins
Jessie G. Atkins
Richard Atkinson
Gloria J. Arnold
Rhona Baugh-Seawright
Jerry Bielawski
Robert Blank
Jim P. Barrentine
Marianne R. Berrigan
Marey Bielawski
Marc Boutwell
Laurie Bridewell
Kenneth M. Bright
Charles Brooks
Martin Brooks
Joel Brown
Debbie Bramlett
Robert Bridewell
Larry Brooks
A. R. Brown
Roger V. Brown
Terry Brown
Jennifer L. Burge
Marvin E. Burnett
Florence Bruemmer
George Burkes, Jr.
Ronny A. Clay
Barbara Colar
Deanna & John Connell
Michael Cobb
John Collins
Pam or Case Cooper
Donna & Ralph Cordasco
Kevin Craig
Leo Cruz
Lori Cutshall
Dominic Damiano
Jason B. Daniel
Brian Davis
Joan V. Davis
Nelson Davis, III
Robert Dawson
Michael Devening
Robert Dickard
Kathe Dietzler
Michael E. Disbrow
John V. Dovich
Tom Drumwright
Leroy Eberly
Dan Edwards
Leo Ellington
George Elliot
Conrad Encarnacion

Brenda Bush
Joan M. Caden
Jamie C. Cameron
Randal Cauley, Jr.
Billy Cain
Kenneth Catrino
William Chandler
Jimmy Cheffen
Peter Choe
Margaret Clarks
Gary Clay
Charles Clark
Mary Katherine Gelston
Brian K. Gillaspy
Richard Glover
Rodger Glover
Tim Gossett
Diana Grant
John Grantham
Susan P. Grayson
Roberta Greenberg
Sheila Griffin
E. Frank Griswold, III
Gary L. Gustafson
Jennifer L. Hakker
Arthur C. Harding
Lynn Harkness
James Hartman
David C. Hays
Wayne Henson
Debra S. Hicks
Gladys Highers
Darryl Hilton
Sammy Hinson

Terry W. Etl
Harold Facemyer
Christopher S. Fawrie
Chris Fernandez
Frank Fietz
Jane Fitzharris
Daryl L. Ford
Robert Fretina
Robert Gaiennie
Jimmy Gamble
Eric E. Gasbarro
Heather M. Gaudet
Jason Lamb
Judy Latonis
Albert G. Latour
Beth M. Leahy
Kevin Leibold
~~Judy Lenoir Day~~
Fred Lester
Charlie Leuenberger
Karen Lewis
Jane Lill
Carla C. Long
Michael Louridas
Roy Majors
John Maples
Kristin Maples
Matthew Martelli
James Mathey
Mabry McBride
Susan McCormick
Brenda McGraw
David McGrew
Gene McWilliams

Cassondra Holly
Jim Holt
Terry Holt
Shelley Hotchkiss
Dex Howard
Michael Huber
Edwin Hulse
Barbara L. Jackson
Robert Jaros
Ronald D. Johnson
Thomas Johnson
Walt Johnson
Angela Jones
Ingrid R. Jordan
Deborah Kean
Bill Keller
Kurt Kellerman
Ger & Joan Kenner
Thomas J. Kerner
Greyson Knapp
Kay Kross
Carol Kusturris
Ida Lamb
Ken Powell
Donita Qualey
Michael Raim
Diane Redys
Ronald G. Rice, Jr.
Mable Richardson
Robert Rudeck
Mattie Rule
Edward Rupp
Angie Russell
Amy Sallee
Dennis Mickunas
Kevin Milkgan
Reese Mills
Winston Milonski
Charles Mize
Debbie Monroe
John V. Monsour
Florence Montanez
William Moran
Stephen J. Morris
Richard C. Moulton
Terry Mundrick
Margaret Naylor
Blair H. Nespole
Tracy Noel
Richard Olson
John Palmer
Howard M. Peregoy
Lawrence Peterson
Genette Pierce
Sue Pledger
Cheryl Porter
James Henry Powell
Kathleen Wehking
William Wehking
Lockwood Wernet
Dawn Whorl
Lawrence J. Wies
Steven Wilkerson
Bill Williams
James Williams
Larry Williams
Thomas S. Williams
Joyce Wilson

Clark Schaffer
Louis Schrader, III
Paul Sharpe
Byron Sharpe, Jr.
Stacy Shewcraft
Sei Shimoguchi
Stuart Shiner
Matthew Sibley
Esther Siewert-Sitzmore
Vernon Sikes
Allison Simmons
Ervin Smith
Richard H. Sollner
Kevin Stafford
James Stone
David Stotts
Cheryl Stuart
Mary Anne Surber
David Swafford
Sarah Swanson
Jeana Wonnacott
Shawn Wood
Tim Wooten
Max Yates
Neal Zimmerman
Acey Swearingen
Beth M. Simon
Allan Simpson
Rhonda Skinner
John A. Sommers
Joe Southern
Timothy Trouy
Rodolfo Trujillo
Jerry Tucker
Allen Vestal
Dennis Wallace
Ryan Wallace
Joseph D. Ward
Willie Webster

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the

litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANANPOLIS DIVISION

In re: BRIDGESTONE/ FIRESTONE, INC. ATX, ATX II AND WILDERNESS: TIRES PRODUCTS LIABILITY LITIGATION	:	Master File No. IP 00-9373-C-B/S MDL No. 1373 (centralized before Honorable Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL ACTIONS	:	

DECLARATION OF ELIZABETH J. CABRASER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, ELIZABETH J. CABRASER, declare as follows:

1. I am a partner in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, and a member of the Executive Committee for Class Plaintiffs in this matter. I have personal knowledge of the manner of preparation of the surveys attached as Exhibits to this declaration, and could competently testify thereto if called upon by the Court to do so.

2. Attached hereto as Exhibit A is plaintiffs' 51

Jurisdiction Survey of Unjust Enrichment, setting forth the common features of the Unjust Enrichment laws of all the jurisdictions within the proposed Class Definition.

3. Attached hereto as Exhibit B is plaintiffs' 51 Jurisdictions Survey: Breach of Express Warranty, establishing the commonality of the Express Warranty laws of all the jurisdictions within the proposed Class Definition.

4. Attached hereto as Exhibit C is plaintiffs' Fifty-One Jurisdiction Survey: Express Warranty Created by Advertising.

5. Attached hereto as Exhibit D is plaintiffs' survey on reliance as an element of express warranty.

6. Attached hereto as Exhibit E is plaintiffs' Chart of Jurisdictions Which Have Adopted Verbatim UCC Article 2-314 (Implied Warranty; Merchantability; Usage of Trade).

7. Attached hereto collectively as Exhibit F is plaintiffs' Summary Requirement of Privity for Breach of Implied Warranty of Merchantability, and a detailed 51 Jurisdiction Survey: Privity Requirement of the Implied Warranty of Merchantability.

8. Attached hereto as Exhibit G is plaintiffs' Chart of Jurisdictions Which Have Adopted Verbatim UCC Article 2-302 (Unconscionable Contract or Clause).

9. Attached hereto collectively as Exhibit H is plaintiffs' survey titled Consumer Fraud Laws of 51 Jurisdictions, and a summary of the Common Characteristics of Consumer Fraud Laws of 51 Jurisdictions.

10. Attached hereto as Exhibit I-A is plaintiffs' 51

Jurisdiction Analysis of Negligence/Economic Loss Rules; and I-B, Proof of Negligence: Jury Instructions at Trial.

11. Attached hereto as Exhibit J is a true and correct copy of the California Supreme Court's January 25, 2001 Opinion in Washington Mutual Bank, FA v. Superior Court, No. S070418, 2001 Cal. LEXIS 27 (also found at 2001 WL 58863 (Cal.)).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 1st day of February, 2001, at San Francisco, California.

/s/

Elizabeth J. Cabraser
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Embarcadero Center West
275 West Battery Street,
30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Alabama	Yes[1]	Yes[2]
Alaska	Yes[3]	Yes[4]
Arizona	Yes[5]	Yes[6]
Arkansas	Yes[7]	Yes[8]
California	Yes[9]	Yes[10]

1. Hancock-Hazlett Gen. Constr. Co. v. Trane Co., 499 So.2d 1385, 1387 (Ala.1986) ("The essence of the theor[y] of unjust enrichment . . . is that . . . defendant holds money which, in equity and good conscience . . . was improperly paid to defendant because of mistake or fraud.")
2. See id.; Ammons v. Coffee County, 716 So.2d 1227, 1230 (Ala. App. 1998).
3. State v. Mitchell, 930 P.2d 1284, 1288 (Alaska 1997).
4. Id.
5. Murdock-Bryant Constr., Inc. v. Pearson, 703 P.2d 1197, 1202 (Ariz. 1985).
6. Id.
7. Guar. Nat'l Ins. v. Denver Roller, Inc., 854 S.W. 2d 312, 317 (Ark. 1993) ("have received something of value, to which he was not entitled and which he must restore.")
8. See id.
9. Pollak v. Staunton, 293 P. 26, 30 (Cal. 1930)
10. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Colorado	Yes[11]	Yes[12]
Connecticut	Yes[13]	Yes[14]
District of Columbia	Yes[15]	Yes[16]
Delaware	Yes[17]	Yes[18]
Florida	Yes[19]	Yes[20]
Georgia	Yes[21]	Yes[22]

11. DCB Constr. Co., Inc. v. Cent. City Dev. Co., 965 P.2d 115, 119 (Co. 1998) (liability exists when the defendant unjustly benefitted at plaintiff's expense).
12. Id.
13. Meaney v. Conn. Hosp. Ass'n, 735 A.2d 813, 820 (Conn. 1999)
14. Id.
15. Emerine v. Yancey, 680 A.2d 1380, 1383 (D.C. App. 1996).
16. Id.
17. Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1062-63 (Del. 1988); Adams v. Jankouskas, 452 A.2d 148, 152 (Del. 1982) (fraudulent, unfair, or unconscionable conduct allows for use of unjust enrichment doctrine).
18. Id.
19. Quinn v. Phipps, 113 So. 419, 422 (Fla. 1927).
20. Id.
21. Engram v. Engram, 463 S.E.2d 12, 15 (Ga. 1995).
22. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Hawaii	Yes[23]	Yes[24]
Idaho	Yes[25]	Yes[26]
Illinois	Yes[27]	Yes[28]
Indiana	Yes[29]	Yes[30]
Iowa	Yes[31]	Yes[32]

23. Small v. Badenhop, 701 P.2d 647, 654 (Haw. 1985) (when property acquired where legal owner cannot retain it "in good conscience" court can order restitution).

24. Id.; see also DeMello v. Home Escrow, Inc., 659 P.2d 759, 764 (Haw. App. 1983).

25. Wilhite v. Northwest Yearly Meeting Pension Fund, 916 P.2d 1264, 1273 (Idaho 1996).

26. Id.; Davenport v. Burke, 167 P.481, 484 (Idaho 1917) (doctrine used where property obtained by fraud).

27. HPI Health Care Servs. Inc. v. Mt. Vernon Hosp., Inc., 545 N.E. 2d 672, 678-79 (Ill. 1989).

28. Id.

29. Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991) ("a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit . . . would be unjust").

30. Id.

31. Slade v. M.L.E. Invest. Co. v. McCoy, 566 N.W.2d 503, 506 (Iowa 1997).

32. Id.; In re Estate of Peck, 497 N.W.2d 889, 890 (Iowa 1993).

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Kansas	Yes[33]	Yes[34]
Kentucky	Yes[35]	Yes[36]
Maine	Yes[37]	Yes[38]
Maryland	Yes[39]	Yes[40]
Massachusetts	Yes[41]	Yes[42]
Michigan	Yes[43]	Yes[44]

33. Wheat v. Finney, 630 P.2d 1160, 1162-63 (Kan. 1981) ("The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to him."); Kampschroeder v. Kampschroeder, 887 P.2d 1152, 1155 (Kan. App. 1995) (unjust enrichment available for situations of fraud)
34. Ids.
35. Bryan Bros. Packing Co. v. Garrard, 386 S.W.2d 469, 474 (Ky. App. 1964)
36. Id.; see Kaplon v. Chase, 690 S.W.2d 761, 763 (Ky. App. 1985) (unjust enrichment available for fraud or other unconscionable conduct).
37. Aladdin Elec. Assoc. v. Old Orchard Beach, 645 A.2d 1142, 1144-45 (Me. 1994).
38. Id.; see Gaulin v. Jones, 481 A.2d 166, 168 (Me. 1984).
39. Mass Transit Admin. v. Granite Constr. Co., 471 A.2d 1121, 1125 (Md. App. 1984).
40. Id.
41. Nat'l Shawmut Bank v. Fidelity Mut. Life Ins. Co., 61 N.E.2d 18, 22 (Mass. 1945).
42. Id.
43. Mich. Educ. Emples. Mut. Ins. Co. v. Morris, 596 N.W.2d 142, 151 (Mich. 1999)
44. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Minnesota	Yes[45]	Yes[46]
Mississippi	Yes[47]	Yes[48]
Missouri	Yes[49]	Yes[50]
Montana	Yes[51]	Yes[52]
Nebraska	Yes[53]	Yes[54]
Nevada	Yes[55]	Yes[56]

45. Timmer v. Gray, 395 N.W.2d 477, 478 (Minn.App.1986) ("actions for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself at the expense of another").
46. Id.
47. Dew v. Langford, 666 So.2d 739, 745 (Miss. 1995).
48. Id.
49. Erslon v. Vee-Jay Cement Contracting Co., 728 S.W.2d 711, 713 (Mo. App. 1987).
50. Id.
51. Lawrence v. Clepper, 865 P.2d 1150, 1156 (Mont. 1993).
52. Id.
53. Professional Recruiters, Inc. v. Oliver, 456 N.W.2d 103, 108 (Neb. 1990).
54. Id.
55. LeasePartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997).
56. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
New Mexico	Yes[57]	Yes[58]
North Carolina	Yes[59]	Yes[60]
North Dakota	Yes[61]	Yes[62]
Ohio	Yes[63]	Yes[64]
Oklahoma	Yes[65]	Yes[66]
Oregon	Yes[67]	Yes[68]

57. Sunwest Bank, N.A. v. Colucci, 872 P.2d 346, 349 (N.M. 1994).
58. Id.
59. Booe v. Shadrick, 369 S.E.2d 554, 555-56 (N.C. 1988)
60. Id.
61. Albrecht v. Walter, 572 N.W. 2d 809, 815 (N.D. 1997).
62. Id.
63. Hambleton v. R.G. Barry Corp., 465 N.E.2d 1298, 1302 (Ohio 1984)
64. Id.
65. N.C. Coroff Partnership, Ltd. v. Oxy USA, Inc., 929 P.2d 288, 295 (Ok. App. 1996).
66. Id.
67. Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Assn., 577 P.2d 477, 491 (Ore. 1978)
68. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Pennsylvania	Yes[69]	Yes[70]
New Hampshire	Yes[71]	Yes[72]
New Jersey	Yes[73]	Yes[74]
New Mexico	Yes[75]	Yes[76]
New York	Yes[77]	Yes[78]
North Carolina	Yes[79]	Yes[80]

69. Sack v. Feinman, 432 A.2d 971, 974 (Pa. 1981)
70. Id.
71. Della Windows and Doors, Inc. v. Faraci, 580 A.2d 732, 732-33 (N.H. 1990).
72. Id.
73. Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 75 (N.J. 1985).
74. Id.
75. Sunwest Bank, N.A. v. Colucci, 872 P.2d 346, 348 (N.M. 1994).
76. Id.
77. Sharp v. Kosmalski, 351 N.E.2d 721, 724 (N.Y. 1976).
78. Id.
79. Embree Constr. Group, Inc. v. Rafcor, Inc., 411 S.E.2d 916, 923 (N.C. 1992)
80. Id.

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Exhibit "A"

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Pennsylvania	Yes[81]	Yes[82]
Rhode Island	Yes[83]	Yes[84]
South Carolina	Yes[85]	Yes[86]
South Dakota	Yes[87]	Yes[88]
Tennessee	Yes[89]	Yes[90]
Texas	Yes[91]	Yes[92]

81. Wingert v. J. W. Phillips Gas & Oil Co., 157 A.2d 92, 96 (Pa. 1959).
82. Id.
83. Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors, 589 A.2d 1201, 1202 (R.I. 1991).
84. Id.
85. Harper v. McCoy, 276 S.E.2d 782, 783-84 (S.C. 1981).
86. Id.
87. McFarland v. McFarland, 470 N.W. 2d 849, 851 (S.D. 1991).
88. Id.
89. Browder v. Hite, 602 S.W.2d 489, 491 (Tenn. App. 1980).
90. Id.
91. Bryan v. Citizens Nat'l Bank, 628 S.W.2d 761, 763 (Tex. 1982).
92. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT

STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Vermont	Yes[93]	Yes[94]
Virginia	Yes[95]	Yes[96]
Washington	Yes[97]	Yes[98]
West Virginia	Yes[99]	Yes[100]
Wisconsin	Yes[101]	Yes[102]

93. Brookside Mem., Inc. v. Barre City, 702 A.2d 47, 50 (Vt. 1997) ("The inquiry is whether, in light of the totality of the circumstances, equity in good conscience demands that the defendant return that which the plaintiff seeks to recover.")

94. Id.

95. City of Norfolk v. Norfolk County, 120 Va. 356, 364, 91 S.E. 820 (Va. 1917) ("where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff" unjust enrichment exists).

96. Id.

97. Hoffer v. State of Washington, 755 P.2d 781, 792 (Wash. 1988) ("[U]nder Washington law, party must make restitution when it has been unjustly enriched at the expense of another. A party is enriched if it has received a benefit, which includes any form of advantage, including being saved from a loss.")

98. Id.

99. Dunlap v. Hinkle, 317 S.E. 2d. 508, 512 (W.V. 1984) ("Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.") (internal quotation omitted); Timberlake v. Heflin, 379 S.E. 2d 149, 155 (W.V. 1989) (remedy for unjust enrichment where property acquired by fraud, or it is inequitable to retain it).

100. Ids.

101. Mgmt. Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co., 557 N.W. 2d 67, 79 (Wis. 1996).

102. Id.

51 JURISDICTION SURVEY OF UNJUST ENRICHMENT		
STATE	UNJUST ENRICHMENT OCCURS WHEN DEFENDANT ACQUIRES BENEFIT INEQUITABLY OR THROUGH WRONGDOING	PRINCIPLES OF EQUITY PROVIDE FOR RESTITUTION OR DISGORGEMENT AS REMEDY FOR UNJUST ENRICHMENT
Wyoming	Yes[103]	Yes[104]

103. Cross v. Berg Lumber Co., 7 P.3d 922, 934 (Wyo. 2000).

104. Id.

EXHIBIT B

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting UCC § 2-313
Alabama	Ala. Code 7-2-313 (Michie 2000)
Alaska	Alaska Stat. § 45.02.313 (2000)
Arizona	Ariz. Rev. Stat. Ann. § 47-2313 (2000)
Arkansas	Ark. Code Ann. 4-2-313 (2000)
California	Cal. Com. Code § 2313 (2001)
Colorado	Colo Rev. Stat. § 4-2-313 (2000)
Connecticut	Conn. Gen. Stat. 42a-2-313 (1999)
Delaware	6 Del. Code Ann.§ 2-313 (2000)
District of Columbia	D.C. Code § 28:2-313 (2000)
Florida	Fla. Stat. § 672.313 (2000)
Georgia	Ga. Code Ann. § 11-2-313 (2000)
Hawaii	Haw. Rev. Stat. § 490:2-313 (Michie 2000)
Idaho	Idaho Code § 28-2-313 (2000)
Illinois	810 Ill. Comp. Stat. Ann. 5/2-313 (2000)
Indiana	Ind. Code Ann. 26-1-2-313 (Burns 2000)
Iowa	Iowa Code Ann. 554.2313 (1999)
Kansas	Kan. Stat. Ann. 84-2-313 (1999)

[1] All jurisdictions (except Louisiana) have expressly adopted UCC § 2-313 governing express warranties. U.C.C. section 2-313 provides that express warranties by the seller are created by: (1) any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. These sections are virtually the same in all 51 jurisdictions.

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting UCC §2-313
Kentucky	Ky. Rev. Stat. Ann. 355.2-313 (2000)
Louisiana	La. Rev. Stat. 9:2800.53(6) (2000)
Maine	11 Me. Rev. Stat. Ann § 2-313 (1999)
Maryland	Md. Com. Law Code Ann. § 2-313 (1999)
Massachusetts	Mass. Ann. Laws ch. 106, § 2-313 (2000)
Michigan	Mich. Stat. Ann. § 19.2313 (2000)
Minnesota	Minn. Stat. § 336.2-313 (2000)
Mississippi	Miss. Code Ann. § 75-2-313 (2000)
Missouri	Mo. Rev. Stat. § 400.2-313 (1999)
Montana	Mont. Code Ann. § 30-2-313 (2000)
Nebraska	Neb. Rev. Stat. (U.C.C.) § 2-313 (2000)
Nevada	Nev. Rev. Stat. § 104.2313 (2000)
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-313 (2000)
New Jersey	N.J. Stat. § 12A:2-313 (2000)
New Mexico	N.M. Stat. Ann. § 55-2-313 (2000)
New York	N.Y.C.L.S. U.C.C. § 2-313 (2000)
North Carolina	N.C. Gen. Stat. § 25-2-313 (2000)
North Dakota	N.D. Cent. Code § 41-02-30 (2000)

[2] Louisiana provides a statutory definition of express warranty quite similar to that in the U.C.C.:
"'Express warranty' means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that reprsents, affirms or promises that the product or its nature, material or workmanship possesses specified chracteristics or qualities or will meet a specified level of performance. 'Express warranty' does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty."
La. Rev. Stat. 2800.53(6).

FIFTY-ONE JURISDICTION SURVEY: BREACH OF EXPRESS WARRANTY	
Jurisdiction	State Statute Adopting U.C.C. § 2-313
Ohio	Ohio Rev. Code Ann. 1302.26 (Anderson 2000)
Oklahoma	12A Okla. Stat. § 2-313 (1999)
Oregon	Or. Rev. Stat. § 72.3130 (1999)
Pennsylvania	13 Pa. Stat. Ann. § 2313 (2000)
Rhode Island	R.I. Gen. Laws § 6A-2-313 (2000)
South Carolina	S.C. Code Ann. § 36-2-313 (1999)
South Dakota	S.D. Codified Laws § 57A-2-313 (2000)
Tennessee	Tenn. Code Ann. § 47-2-313 (2000)
Texas	Tex. Bus. & Com. Code § 2.313 (2000)
Utah	Utah Code Ann. § 70A-2-313 (2000)
Vermont	9A Vt. Stat. Ann. § 2-313 (2000)
Virginia	Va. Code Ann. § 8.2-313 (2000)
Washington	Wash. Rev. Code § 62A.2-313 (2000)
West Virginia	W. Va. Code § 46-2-313 (2000)
Wisconsin	Wis. Stat. § 402.313 (1999)
Wyoming	Wyo. Stat. § 34.1-2-313 (2000)

EXHIBIT C

FIFTY-ONE JURISDICTION SURVEY: EXPRESS WARRANTY CREATED BY ADVERTISING

Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
Alabama	Ricwil, Inc. v. S.L. Pappas & Co., 599 So.2d 1126, 1131 (1992)	✓
Alaska	No case law on point	Open question
Arizona	Eck v. Helene Curtis Industries, Inc., 453 P.2d 366, 369 (Ct. App. 1969)	✓
Arkansas	Ciba-Geigy Corp. v. Alter, 834 S.W. 2d 136, 146-147 (1992)	✓
California	Anthony v. GM Corp., 109 Cal. Rptr. 254 (1973)	✓
Colorado	American Safety Equipment Corp. v. Winkler, 640 P.2d 216, 220-21 (1982)	✓
Connecticut	Hamon v. Digliani, 174 A.2d 294, 297 (1961)	✓
Delaware	Mullen v. Alarmguard of Delmarva, Inc., 1992 Del. Super. LEXIS 224, *4 (1992); overruled on other grounds, 625 A. 2d 258 (1993)	✓
District of Columbia	W.G. Cornell Co. of Washington, D.C. v. Ceramic Coating Co., Inc., 626 F.2d 990, 992 n.1	✓
Florida	State Farm Insurance Co. v. Nu Prime Roll-A-Way of Miami, Inc., 557 So.2d 107 (Ct. App. 1990)	✓
Georgia	Stewart v. Gainesville Gas Co., Inc., 212 S.E. 2d 377, 378 (1975) (Ingram, J., dissent)	✓
Hawaii	No case law on point	Open question
Idaho	Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 71 (1983)	✓
Illinois	Connick v. Suzuki Motor Co., 656 N.E.2d 170, 177 (Ct. App. 1995); vacated and remanded on other grounds sub. nom 660 N.E. 2d 1267 (1995)	✓
Indiana	Prairie Production, Inc. v. Agchem Division - Pennwalt Corp., 514 N.E.2d 1299, 1302-03 (Ct. App. 1987)	✓
Iowa	Midland Forge, Inc. v. Letts Industries, Inc., 395 F. Supp. 506, 511 (N.D. Iowa 1975)	✓
Kansas	Scheuler v. Aamco Transmissions, Inc., 571 P.2d 48, 51 (1977)	✓
Kentucky	King v. Ohio Valley Terminix Co., 214 S.W. 2d 993, 996 (1948)	✓

FIFTY-ONE JURISDICTION SURVEY: EXPRESS WARRANTY CREATED BY ADVERTISING		
Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
Louisiana[1]	Walton v. Katz and Besthoff, Inc., 77 So.2d 563, 564 (1955)	✓
Maine	McNally v. Nicholson Manufacturing Co., 313 A.2d 913, 920 (1973)	✓
Maryland	Lowe v. Sporicidin Intl., 47 F.3d 124, 132 (4th Cir. 1995)	✓
Massachusetts	Hannon v. Original Gunite Aquatech Pools, Inc., 434 N.E. 2d 611, 617 (1982)	✓
Michigan	Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254, 258 (6th Cir. 1960)	✓
Minnesota	Baumgartner v. Glesner, 214 N.W. 27, 28 (1927)	✓
Mississippi	Taylor v. Ward, 393 So.2d 1342, 1346 (1981)	✓
Missouri	Interco Inc. v. Randustrial Corp., 533 S.W. 2d 257, 262 (Ct. App. 1976)	✓
Montana	Whitaker v. Farmhand, Inc., 567 P.2d 916, 920 (1977)	✓
Nebraska	Hawkins Construction Co. v. Matthews Co., Inc., 209 N.W. 2d 643, 653 (1973), overruled in part, Nat'l. Crane Corp. v. Ohio Steel Cube Co., 332 N.W. 2d 39 (1983)	✓
Nevada	No case law on point	Open question
New Hampshire	Chellman v. Saab-Scania AB, 637 A. 2d 148, 153 (1993)	✓
New Jersey	Henningsen v. Bloomfield Motors, Inc., 161 A. 2d 69, 84 (1960)	✓
New Mexico	Vitro Corp. of America v. Texas Vitrified Supply Co., 376 P.2d 41, 46 (1962)	✓
New York	Eddington v. Dick, 386 N.Y.S.2d 180, 181 (City Ct. 1976)	✓
North Carolina	Kinlaw v. Long Manufacturing N.C., Inc., 259 S.E. 2d 552, 557 (1979)	✓
North Dakota	Haugen v. Ford Motor Co., 219 N.W. 2d 462, 466 (1974)	✓

[1] Louisiana provides a statutory definition of express warranty:

"'Express warranty' means a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance. 'Express warranty' does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty."

La. Rev. Stat. 2800.53(6) (1996).

[illegible] ON JURISDICTION'S STATE'S EXPRESS WARRANTY CREATED BY ADVERTISING		
Jurisdiction	Case Recognizing Principle	Recognizes Express Warranty Created By Advertising
[illegible]	Inglis v. American Motors Corp., 209 N.E. 2d 583, 589 (1965)	✓
[illegible]	No case law on point	Open question
[illegible]	Newman v. Tualatin Development Co., 597 P.2d 800, 803 (1979)	✓
[illegible]	Klages v. General Ordnance Equipment Corp., 367 A.2d 304, 308 (1976)	✓
[illegible]	Salk v. Alpine Ski Shop, 342 A.2d 622, 626 (1975)	✓
[illegible]	Campus Sweater and Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 94 (D.S.C. 1979)	✓
[illegible]	Drier v. Perfection, Inc., 259 N.W. 2d 496, 502 (1977),	✓
[illegible]	Ford Motor Co. v. Lonan, 398 S.W. 2d 240, 242 (1966), overruled in part sub nom., First Nat'l Bank v. Brooks Farms, 821 S.W. 2d 925 (1991)	✓
[illegible]	Appleby v. Hendrix, 673 S.W. 2d 295, 297 (Ct. App. 1984)	✓
[illegible]	State v. GAF Corp., 760 P2d 310, 315 (1988)	✓
[illegible]	Taylor v. Alfarna, 481 A.2d 1059, 1060 (1984)	✓
[illegible]	Carney v. Sears, Roebuck & Co., 309 F.2d 300, 304 (4th Cir. 1962)	✓
[illegible]	Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc., 831 P.2d 724, 731 (1992)	✓
[illegible]	Dawson v. Canteen Corp., 212 S.E. 2d 82, 84 (1975)	✓
[illegible]	Hellenbrand v. Bowar, 114 N.W. 2d 418, 422 (1962)	✓
[illegible]	Walters v. Grand Teton Crest Outfitters, Inc., 804 F. Supp. 1442, 1446 (1992)	✓

EXHIBIT D

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
Jurisdiction	Case Cite	Yes/No
Alabama	Winston Indus., Inc. v. Stuyvesant Ins. Co., Inc., 317 So.2d 493, 496-97 (Ala. App. 1975).	No
Alaska	No case law requiring plaintiff to prove reliance.	No
Arizona	Downs v. Shouse, 501 P.2d 401 (Az. App. 1972) (reliance only relevant where defect is patently obvious).	No
Arkansas	Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136 (Ark. 1992).	Yes
California	Hauter v. Zogarts, 534 P.2d 377, 383-84 (Cal. 1975).	No
Colorado	No case law requiring plaintiff to prove reliance.	No
Connecticut	No case law requiring plaintiff to prove reliance.	No
Delaware	Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 659 (Del. Sup. Ct. 1984).	No
District of Columbia	No case law requiring plaintiff to prove reliance.	No
Florida	Carter Hawley Hale Stores, Inc. v. Conley, 372 So.2d 965 (Fla. App. 1979).	No
Georgia	No case law requiring plaintiff to prove reliance.	No
Hawaii	No case law requiring plaintiff to prove reliance.	No
Idaho	Jensen v. Seigel Mobile Homes, 668 P.2d 65, 70-71 (Idaho 1983).	No
Illinois	Corvell v. Lombard Lincoln-Mercury, 544 N.E. 2d 1154 (Ill. App. 1989).	Yes
Indiana	Shambaugh v. Lindsay, 445 N.E.2d 124, 126-27 (Ind. App. 1983).	No
Iowa	Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).	Yes
Kansas	Young & Cooper, Inc. v. Vestring, 521 P.2d 281, 291 (Kan. 1974).	No
Kentucky	No post-adoption of UCC case law requiring plaintiffs to prove reliance.	No

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
Jurisdiction	Case Site	Yes/No
Louisiana	No case law requiring plaintiff to prove reliance.	No
Maine	Phillips v. Ripley & Fletcher Co., 541 A.2d 946 (Me. 1988).	Yes
Maryland	No post-adoption of U.C.C. case law requiring plaintiffs to prove reliance.	No
Massachusetts	No case law requiring plaintiff to prove reliance.	No
Michigan	No case law requiring plaintiff to prove reliance.	No
Minnesota	Saunders v. Cowl, 277 N.W. 12 (Minn. 1938).	No
Mississippi	No case law requiring plaintiff to prove reliance.	No
Missouri	Interco Inc. v. Randustrial Corp., 533 S.W.2d 257, 261-62 (Mo. App. 1976).	No
Montana	Glacier General Assurance Co. v. Casualty Indemnity Exchange, 435 F. Supp. 855, 860 (D. Mon. 1977).	No
Nebraska	Hawkins Construction Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973), overruled in part on other grounds, National Crane Corp. v. Ohio Steel Tube Co., 332 N.W.2d 39 (Neb. 1983).	No
Nevada	Allied Fidelity Ins. Co. v. Pico, 656 P.2d 849, 850 (Nev. 1983).	No
New Hampshire	Werner v. Montana, 378 A.2d 1130, 1136 (N.H. 1977).	No
New Jersey	Gladden v. Cadillac Motor Car Division, 416 A.2d 394, 396 (N.J. 1980).	No
New Mexico	C.R. Anthony Co. v. Loretto Mall, 817 P.2d 238, 246 (N.M. 1991).	No
New York	CBS, Inc. v. Ziff-Davis Publishing Co., 553 N.E.2d 997, 1001 (N.Y. 1990); Ainger v. Michigan General Corp., 476 F. Supp. 1209, 1224-25 (S.D.N.Y. 1979), aff'd 632 F.2d 1025 (2d Cir. 1980).	No
North Carolina	Kinlaw v. Long Mfg. N.C., Inc., 259 S.E.2d 552, n.7 (N.C. 1978).	No

DO PLAINTIFFS HAVE TO PROVE RELIANCE ON THE EXPRESS WARRANTY?		
[illegible]	[illegible]	[illegible]
North Dakota	No case law requiring plaintiff to prove reliance.	No
Ohio	Pratt v. Bowling, No. CA-489 Slip. Op. (Ohio App. 1983).	No
Oklahoma	Thompson v. Peters, 885 P.2d 686 (Ok. Ct. of App. 1994).	Yes
Oregon	Newman v. Tualatin Dev. Co., 597 P.2d 800 (Or. 1978).	Yes
Pennsylvania	Sessa v. Riegle, 427 F. Supp. 760, 766 (E.D. Penn. 1977), aff'd w/o opp., 568 F.2d 770 (3d Cir. 1978).	No
Rhode Island	Thomas v. Amway Corp., 488 A.2d 716 (R.I. 1985).	Yes
South Carolina	No case law requiring plaintiff to prove reliance.	No
South Dakota	Schmaltz v. Nissen, 431 N.W.2d 657 (S.D. 1988).	Yes
Tennessee	No case law requiring plaintiff to prove reliance.	No
Texas	Harris Packaging Corp. v. Baker Concrete Const. Co., 982 S.W.2d 62 (Tex. App. 1998).	Yes
Utah	Mgmt. Comm. v. Graystone Pines, Inc., 652 P.2d 896, 899 (Utah 1982).	Yes
Vermont	No case law requiring plaintiff to prove reliance.	No
Virginia	Daughtrey v. Ashe, 413 S.E.2d 336, 338-39 (Va. 1992).	No
Washington	Butcher v. Garrett-Enumclaw Co., 581 P.2d 1352 (Wa. App. 1978).	No
West Virginia	No case law requiring plaintiff to prove reliance.	No
Wisconsin	Ewers v. Eisenzopf, 276 N.W.2d 802, 805 (Wisc. 1979).	No
Wyoming	No case law requiring plaintiff to prove reliance.	No

EXHIBIT E

CHART OF JURISDICTIONS WHICH HAVE ADOPTED VERBATIM UCC ARTICLE 2-314

UCC ARTICLE 2-314
IMPLIED WARRANTY; MERCHANTABILITY; USAGE OF TRADE

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

JURISDICTION	UCC ARTICLE 2-314
Alabama	Ala. Code 7-2-314 (see footnote)
Alaska	Alaska Stat. 7-2-314 (see footnote)
Arizona	Ariz. Rev. Stat. Ann. 47-2314 ("service" used instead of "serving")
Arkansas	Ark. Code Ann. 2314
California	Cal. Com. Code 2314
Colorado	Colo. Rev. Stat. 4-2-314 (uses additional comma)
Connecticut	Conn. Gen. Stat. 42a-2-314
Delaware	Del. Code Ann. tit. 6, 2-314
District of Columbia	D.C. Code Ann. 28:2-314 ("or" used instead of "other")
Florida	Fla. Stat. 672.314
Georgia	Ga. Code Ann. 11-2-314 (inserts the word "Code"; uses an additional comma)
Hawaii	Haw. Rev. Stat. 490:2-314
Idaho	Idaho Code 28-2-314
Illinois	Ill. Comp. Stat. Ann. Ch. 810, 5/2-314
Indiana	Ind. Code Ann. 26-1-2-314 (uses additional comma)
Iowa	Iowa Code Ann. 554.2314
Kansas	Kan. Stat. Ann. 84-2-314
Kentucky	Ky. Rev. Stat. Ann. 355.2-314
Louisiana	*Did Not Adopt*
Maine	Me. Rev. Stat. Ann. tit. 11, 2-314
Maryland	Md. Code Ann., Com. Law 2-314 (see footnote)
Massachusetts	Mass. Ann. Laws ch. 106, 2-314
Michigan	Mich. Stat. Ann. 440.2314
Minnesota	Minn. Stat. 336.2-314
Mississippi	Miss. Code Ann. 75-2-314 (see footnote, one less comma used)

Missouri	Mo. Rev. Stat. 400.2-314
Montana	Mont. Code Ann. 30-2-314
Nebraska	Neb. Rev. Stat. (U.C.C.) 2-314
Nevada	Nev. Rev. Stat. 104.2314
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-314
New Jersey	N.J. Stat. 12A:2-314
New Mexico	N.M. Stat. Ann. 55-2-314
New York	N.Y. U.C.C. Law 2-314
North Carolina	N.C. Gen. Stat. 25-2-314
North Dakota	N.D. Cent. Code 41-02-31
Ohio	Ohio Rev. Code Ann. 1302.27
Oklahoma	Okla. Stat. tit. 12A, 2-314
Oregon	Or. Rev. Stat. 72.3140
Pennsylvania	Pa. Stat. Ann. tit. 13, 2314
Rhode Island	R.I. Gen. Laws 6A-2-314
South Carolina	S.C. Code Ann. 36-2-314
South Dakota	S.D. Codified Laws 57A-2-314
Tennessee	Tenn. Code Ann. 47-2-314
Texas	Tex. Bus. & Com. Code Ann. 2.314
Utah	Utah Code Ann. 70A-2-314
Vermont	Vt. Stat. Ann. tit. 9A, 2-314
Virginia	Va. Code Ann. 8.2-314
Washington	Wash. Rev. Code 62A.2-314
West Virginia	W. Va. Code 46-2-314
Wisconsin	Wis. Stat. 402.314
Wyoming	Wyo. Stat. 34.1-2-314

Additions to State Jurisdictions UCC Article 2-314

Alabama and Alaska have adopted a section (labeled Section 4), which provides as follows:

(4) Procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing, or transplanting any of them in the human body in declared for all purposes to be the rendition of a service by every person participating therein and whether any remuneration is paid therefor is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives, or other human tissues.

Maryland has adopted two subsections to Section 1 (labeled A and B), which provide as follows:

(A) In §§ 2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman of the retailer; and
(B) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

Maryland has adopted Section 4, which provides as follows:

(4) Subsections (1) and (2) of this section apply to a lease of goods and a bailment for hire of goods that pass through the physical possession of and are maintained by the lessor, sublessor, or bailor.

Mississippi has adopted Section 4, which provides as follows:

(4) With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

Mississippi has adopted Section 5, which provides as follows:

(5) Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

SUMMARY OF REQUIREMENT OF PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

JURISDICTIONS REQUIRING PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY		JURISDICTIONS WHERE PRIVITY IS NOT REQUIRED FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY	
Alabama	Wisconsin	Alaska	Montana
Arizona		Arkansas	Nebraska
California		Colorado	Nevada
Connecticut		Delaware	New Hampshire
Georgia		District of Columbia	New Jersey
Idaho		Florida	New Mexico
Illinois		Hawaii	North Carolina
Kansas		Indiana	North Dakota
New York		Iowa	Oklahoma
Ohio		Kentucky	Pennsylvania
Oregon		Maine	South Carolina
Rhode Island		Maryland	South Dakota
Tennessee		Massachusetts	Virginia
Texas		Michigan	West Virginia
Utah		Minnesota	Wyoming
Vermont		Mississippi	
Washington		Missouri	

EXHIBIT F

SUMMARY OF REQUIREMENT OF PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

JURISDICTIONS REQUIRING PRIVITY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY		JURISDICTIONS WHERE PRIVITY IS NOT REQUIRED FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY	
Alabama	Wisconsin	Alaska	Montana
Arizona		Arkansas	Nebraska
California		Colorado	Nevada
Connecticut		Delaware	New Hampshire
Georgia		District of Columbia	New Jersey
Idaho		Florida	New Mexico
Illinois		Hawaii	North Carolina
Kansas		Indiana	North Dakota
New York		Iowa	Oklahoma
Ohio		Kentucky	Pennsylvania
Oregon		Maine	South Carolina
Rhode Island		Maryland	South Dakota
Tennessee		Massachusetts	Virginia
Texas		Michigan	West Virginia
Utah		Minnesota	Wyoming
Vermont		Mississippi	
Washington		Missouri	

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Alabama	"While Alabama's version of U.C.C. § 2-318 has abolished privity requirements in actions involving injuries to natural persons, the privity requirements still remains in cases of strictly economic injury." State Farm Fire & Cas. Co. v. J.B. Plastics, Inc., 505 So.2d 1223, 1227 (Ala. 1987).	
Alaska		"There is no longer any requirement in Alaska that privity exist between the buyer and seller for recovery of property damage or economic loss under breach of warranty theory." Shooshanian v. Wagner, 672 P.2d 455, 462 (Alaska 1983)(citing Morrow v. New Moon Homes, 548 P.2d 279, 288-89 (Alaska 1976)).
Arizona	"As to these warranties [under § 2-314 (1)], we hold that lack of privity does preclude recovery." Flory v. Silvercrest Indus., Inc., 633 P.2d 383, 387 (Ariz. 1981).	
Arkansas		"In recovery for breach of implied warranty of merchantability, the plaintiff must prove… that he was a person whom the defendant might reasonably expect to use or be affected by the product." E.I. Du Pont De Nemours & Co. v. Dillaha, 659 S.W. 2d 756, 758 (Ark. 1983).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
California	"On the matter of liability under a breach of warranty theory, . . . privity between the plaintiffs and defendants remains a requirement for actions based upon the implied warranty of merchantability." Rodrigues v. Campbell Indus., 87 Cal. App. 3d 494, 500 (Cal. Ct. App. 1978).	
Colorado		"Because lack of privity no longer presents an obstacle to recovery for breach of implied warranty, an action may lie against the blood bank on that theory." Hansen v. Mercy Hosp., 570 P.2d 1309, 1311 (Colo. Ct. App. 1977) (citing § 4-2-318, C.R.S. 1973; Hiigel v. Gen. Motors Corp., 544 P.2d 983 (Colo. 1975)).
Connecticut	"In his complaint, the plaintiff alleged that Dodge acted as an agent for Chrysler and that the implied warranty of merchantability thus ran against or was imputed by Chrysler . . . . This being so, a privity of contract between the parties must be shown." Koellmer v. Chrysler Motors Corp., 276 A.2d 807, 812 (Conn. Cir. Ct. 1970).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Delaware		"By analogy, Dillion is support for the proposition that just as the privity requirement has been abandoned in personal injury actions where the item is inherently dangerous, so should the privity requirement be abandoned in actions for economic injury where the good is inherently defective." Pack & Process, Inc. v. The Celotex Corp., 503 A.2d 646, 660 (Del. Super.Ct. 1985) (citing Dillion v. Gen. Motors Corp., 315 A.2d 732 (Del. Super. 1974)) "The Court is of the opinion that the concern of the authors of the Delaware Study Comment to 6 Del. C. § 2-318 that ultimate consumers of defective goods not be left without recovery against remote manufacturers, wholesalers and other vendors justifies such a conclusion." Id. (quoting 6 Del. C. § 2-318 at 59.).
District of Columbia		"One statement should be made at the outset about which there must be no confusion--the District of Columbia is a jurisdiction affording recovery for tortious injury to the ultimate consumer--whether sought under a theory of strict liability or implied warranty. Bowler v. Stewart-Warner Corp., 563 A.2d 344,345 (D.C. 1989).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Florida		"[W]e conclude that neither the absence of privity between the manufacturer and a purchaser such as Manheim, nor the execution of a written warranty agreement between the manufacturer and its dealer of the kind hereinbefore appearing operates to preclude recovery on the basis of implied warranty of a product due to its defects and lack of fitness and suitability." Manheim v. Ford Motor Co., 201 So.2d. 440, 442 (Fla. 1967). "Therefore … the Court concludes that under present Florida law one party may sue another in the distributive chain for breach of warranty notwithstanding lack of privity, even where the injury suffered is a mere economic disappointment." Autrey v. Chemitrust Indus. Corp., 362 F.Supp. 1085, 1092 (D. Del. 1973)
Georgia	"Even if an implied warranty were not excluded by the terms of the express warranty there could be no recovery by Halco because of a lack of privity between it and General Motors." Gen. Motors Corp. v. Halco Instruments, Inc., 185 S.E.2d 619, 622 (Ga. Ct. App. 1971).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Hawaii		"Section 490:2-318, Hawaii's enactment of UCC § 2-318, abolishes the defense of privity to an action for breach of warranty." GKW Electronics, Inc. v. Zenith Electronics Corp., 967 F.2d 586, No. 91-15791, 1992 WL 158882, at *2 (9th Cir. 1992).
Idaho	"Courts and commentators making the distinction between tort and contract recognize that privity of contract is necessary in a contract action for breach of implied warranty." Salmon Rivers Sportsman Camps v. Cessna Aircraft Co., 544 P.2d 306, 311 (Idaho 1975). "We agree with Professor Prosser's quoted statements and the cases listed above, and conclude that privity of contract is required in a contract action to recover economic loss for breach of implied warranty." Id. at 312.	
Illinois	"Before proceeding to the specifics of plaintiff's appeal, we affirm the directed verdict for Subaru on Count II of the third amended complaint, alleging a breach of Subaru's implied warranty of merchantability under section 2-314 of the Code (Ill. Rev. Stat. 1985, ch. 26, par. 2-314). We base that affirmance on the lack of contractual privity between plaintiff and Subaru." Tokar v. Crestwood Imports, Inc., 532 N.E.2d 382, 700 (Ill. App. Ct. 1988).	
		"Indiana has adhered to the general rule that implied

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Indiana		warranties, as they relate to economic loss from the bargain, cannot ordinarily be sustained between the buyer and a remote manufacturer." Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1301 (Ind. Ct. App. 1987). "An exception to [the privity] rule allows a suit in implied warranty despite lack of privity when the contractual arrangements between the manufacturer and the dealer create an agency relationship, and where it is further shown that the manufacturer's agents participated significantly in the sale by means of advertising and personal contact with the buyer." Sanco, Inc. v. Ford Motor Co., 579 F.Supp. 893, 899 (S.D. Ind. 1984) (citing Thompson Farms v. Corno Feed Products, 366 N.E.2d 3 (Ind. Ct. App. 1977).
Iowa		"Defendant's argument that there was no privity of contract is unavailing since, under Iowa law, the requirement of privity has been abandoned." Hardman v. Helene Curtis Indus., Inc., 198 N.E.2d 681, 691 (Ill. App. Ct. 1964).
Kansas	"We conclude implied warranties of fitness and merchantability are not extended to a remote seller or manufacturer of an allegedly defective product, which is not inherently dangerous, for only economic loss suffered by a buyer who is not in contractual privity with the remote seller or manufacturer." Professional Lens Plan, Inc. v.	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
	Polaris Leasing Corp., Impact Sys., 675 P.2d 887, 898-99 (Kan. 1984)	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Kentucky		"We think we would do no judicial violence to hold that the law in this jurisdiction is that privity is not a prerequisite to maintenance of an action for breach of implied warranty in products liability cases, upon the authority and reasoning enunciated in Henningsen v. Bloomfield Motors." Dealers Transport Co. v. Battery Distrib. Co., Inc., 402 S.W.2d 441, 446 (Ky. 1965) (citing Henningsen v. Bloomfield Motors, , 161 A.2d 69, (N.J. 1960)).
Louisiana	Did not adopt UCC	Did not adopt UCC
Maine		"In Maine, '[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods for breach of warranty, express or implied, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.'" Sullivan v. Young Brothers & Co., 91 F.3d 242, 249-50 (1st Cir. 1996)(quoting, ME. REV. STAT. ANN. tit. 11, § 2-318 (West 1999)).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Maryland		"Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer." MD. CODE. ANN., sales § 2-314
Massachusetts		"Does the lack of privity bar recovery? It does not. The fundamental purpose of §2-318, as amended, is to eliminate lack of privity as a defense in a breach of warranty action." Cameo Curtains, Inc. v. Philip Carey Corp., 416 N.E.2d 995, 998 (Mass. App. Ct. 1981).
Michigan		"This and later cases put Michigan in the forefront of those states which do not require privity for actions on implied warranty." Serjanina v. Assn. Material and Supply Co., 151 N.W.2d 345 (Mich. Ct. App. 1967).
Minnesota		"[U]nder Minnesota law a seller's implied warranty of merchantability extends to a purchaser such as IGI despite the absence of privity of contract . . . ." Indus. Graphics, Inc. v. Asashi Corp., 485 F. Supp. 793, 800 (D. Minn. 1980).
Mississippi		"Therefore, we are of the opinion that a seller is responsible for the economic loss which results from his breach of an implied warranty of merchantability without regard to privity." Volkswagen of Am., Inc. v. Novak, 418 So.2d 801, 803 (Miss. 1982).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Missouri		"Broadmoor may, however, maintain an action for economic loss on an implied warranty theory under Mo. Rev. Stat § 400.2-314 & 400.2-315, even though it is not in privity with Otis." Collegiate Enter., Inc. v. Otis Elevator Co., 650 F. Supp. 116, 118 (E.D. Mo. 1986).
Montana		"The privity requirement was abolished in Montana and a remote manufacturer may be liable for breach of implied warranties." Streich v. Hilton-Davis, 692 P.2d 440, 448 (Mont. 1984) (citing Whitaker v. Farmhand, Inc., 567 P.2d 916 (Mont. 1977)).
Nebraska		"However, the existence of an implied warranty of merchantability does not depend upon privity between Chicago Lumber and the joint venture partnership." Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd., 506 N.W.2d 706, 713 (Neb. 1993) (citing Peterson v. North Am. Plant Breeders, 354 N.W.2d 625 (Neb. 1984)).
Nevada		"Instead, we believe that lack of privity between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties." Hiles Co. v. Johnston Pump Co., 560 P.2d 154, 157 (Nev. 1977).
New Hampshire		"Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
		was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods." N.H. REV. STAT. ANN. § 382-A:2-318.

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
New Jersey		"We hold also that the buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties." Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660, 663 (N.J. 1985). "[A] plaintiff in a suit for breach of warranty against a remote seller, like a plaintiff in a strict liability action, need not establish privity with or negligence by the defendant." Id. at 676. "We conclude that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer." Id. at 674.
New Mexico		"We hold that defendant may be held liable for breach of implied warranty of merchantability under the UCC without regard to privity of contract between defendant and either plaintiff or her surgeon." Perfetti v. McGhan Medical, 662 P.2d 646, 655 (N.M. Ct. App. 1983).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
New York	"Futhermore, because it sustained economic loss only, plaintiff, who is not in privity with Fiat, may not recover on a claim of breach of implied warranty." Arthur Jaffe Assoc. v. Bilsco Auto Serv., Inc. 453 N.Y.S.2d 501, 502 (N.Y. App. Div. 1982) (citing Hole v. Gen. Motors Corp., 442 N.Y.S.2d 638 (N.Y. App. Div. 1981). "Our interpretation of [section 2-318] leads us to conclude that it does not permit a plaintiff, not in privity, to recover upon the breach of an implied warranty of merchantability unless the claim of the remote user is for personal injuries." Hole, 442 N.Y.S.2d at 640.	
North Carolina		"[T]he absence of privity does not bar plaintiff's recovery against the automobile manufacturer." Tommy Williams v. Hyatt Chrysler-Plymouth, Inc., 269 S.E.2d 184, 188 (N.C. Ct. App., 1980)

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
North Dakota		"Although the parties to an action based on implied warranty need not be in direct contractual privity, any implied warranty generally follows a sale or consumer purchase or arises though some economic relationship." Sime v. Tvenge Assoc. Architects & Planners, P.C., 488 N.W.2d 606, 611 (N.D. 1992) (citing Lang v. Gen. Motors Corp., 136 N.W.2d 805 (N.D. 1965)). "Accordingly, under modern marketing conditions, when a manufacturer puts a new truck-tractor or other new product into the stream of trade and promotes its sale to the public, an implied warranty that it is reasonably fit and suitable for use, as such, accompanies such new vehicle into the hands of the ultimate buyer. Absence of privity between the manufacturer and the buyer is immaterial." Lang v. General Motors Co., 136 N.W.2d 805, 810 (N.D. 1965).
Ohio	"Absent privity, claims for breach of implied warranty must be pursued as tort claims." Trgo v. Chrysler Corp., 34 F. Supp.2d 581, 587 (N.D. Ohio 1998).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Oklahoma		"We hold a manufacturer may be held liable for breach of implied warranty of merchantability or fitness for particular purpose under the Uniform Commercial Code without regard to privity of the contract between the manufacturer and the ultimate buyer." Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849, 852 (Okla. 1980).
Oregon	"This court has adhered to the rule that privity of contract is essential before a purchaser can recover economic loss from a manufacturer for breach of implied warranty." Davis v. Homasote Co., 574 P.2d 1116, 1117 (Or. 1977).	
Pennsylvania		"[Plaintiff's] cause of actioin is based on Pennsylvania law, that allows recovery for breaches of implied warranties even though there is no privity between the purchaser and the remote manufacturer." Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1180-81 (3rd Cir. 1972).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Rhode Island	Rhode Island courts have not unequivocally said whether privity is a requirement for recovery of economic damages as a result of a breach of the implied warranty of merchantability. Rhode Island jurisprudence, however, indicates that the state has not abandoned the privity requirement. See Francis v. Alaska Diesel Electric, Inc., 52 F.Supp. 2d 511, 518 (D.R.I. 1999) ("[T]he Rhode Island courts have emphasized the importance of privity of contract in the application of the economic loss doctrine."); see also Hart Eng'g Co. v. FMC Corp., 593 F.Supp. 1471 (D.R.I. 1984).	
South Carolina		"The plain language of ... section [36-2-318] dispenses with the necessity of privity as to any natural person who may be expected to use, consume or be affected by the product, and extends third party beneficiary protection to this class of person with respect to both injury and damage to 'person or property.'" Gasque v. Eagle Mach. Co., Ltd., 243 S.E.2d 831, 832 (S.C. 1978).

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
South Dakota		"It was decided in federal court on the basis of South Dakota law that 'lack of privity is no defense in South Dakota in a breach of implied warranty action by a remote buyer against a manufacturer even though the buyer seeks only the recovery of damages for economic losses.'" Cundy v. Int'l Trencher Service, Inc., 358 N.W.2d 233, 240 (S.D. 1984) (quoting Horizons, Inc. v. Avco Corp., 551 F.Supp. 771, 777-78 (W.D.S.D. 1982)).
Tennessee	"Therefore, we must necessarily reach the conclusion that the rule requiring privity of contract between the parties as an essential element of implied warranty still exists in Tennessee, except in cases where the product involved is 'in defective condition unreasonably dangerous to the user or to his property.'" Leach v. Wiles, 429 S.W.2d 823, 831 (Tenn. Ct. App. 1968)	
Texas	"As plaintiff bases his suit on a theory of breach of warranties, both express and implied, there can be no recovery of consequential economic damages from the remote manufacturer in this case because of the lack of privity of contract between them." Veretto v. Eli Lilly & Co., 369 F. Supp. 1254, 1255 (N.D. Tex. 1974)	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Utah	"A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods an who is injured by breach of the warranty." Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 18 n. 8 (Utah, 1990) "The purpose of [section 70A-2-318] is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'" Id. at 18.	
Vermont	" Moreover, as recently as 1988, the Vermont Supreme Court noted that the Vermont version of the UCC, unlike that of Massachusetts, has not eliminated the privity requirement beyond that expressed in § 2-318. Mainline Tractor & Equip. Co., Inc. v. Nutrite Corp., 937 F.Supp. 1095, 1108 (D. Vermont, 1996)(citing Costa v. Volkswagen of Am., 551 A.2d 1196 (1988), overruled on other grounds by Gochey v. Bombardier, Inc., 572 A.2d 921 (Vt. 1990)).	

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STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
Virginia		"Lack of privity between plaintiff an defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods . . . ." Va. Code Ann. § 8.2-318; but see, Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc., 491 S.E. 2d 731, 734 (Va. 1997)("Section 8.2-715 (2)(a) does not address the general subject of the common law privity requirement's effect on the ability of a litigant to maintain an action for breach of warranty. It is limited to that part of the litigation dealing with the damages which may be recovered and imposes a contract requirement only where recovery of consequential damages is sought. Applying the rule of statutory construction recited above, the limited contract requirement of § 8.2-715 (2) prevails over the general provisions relating to common law privity in § 8.2-318.").
Washington	"We hold that vertical privity controls warranty issues here between a remote manufacturer and ultimate purchaser." Touchet Valley Grain Growers, Inc. v. OPP & Seibold General Constr., Inc., 831 P.2d 724, 730 (Wash. 1992).	

STATE	PRIVITY REQUIRED	PRIVITY NOT REQUIRED
West Virginia		"'The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished.'" Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296, 304 (W.Va. 1980) (quoting Roosevelt v. Canteen Corp., 212 S.E.2d 82 (W.Va. 1975)).
Wisconsin	"The plaintiff concedes that the law of Wisconsin has always required privity of contract in an action for breach of implied warranty." Dippel v. Sciano, 155 N.W.2d 55, 57 (Wis. 1967)(citations omitted).	
Wyoming		"The question raised by this appeal is whether privity of contract is required or is not required in an action by a remote purchase against a manufacturer to recover an economic loss . . . . We shall hold that privity of contract is not necessary in such an action." Western Equip. Co., Inc. v. Sheridan Iron Works, Inc., 605 P.2d 806, 807 (Wyo. 1980).

Of fifty-one jurisdictions analyzed, seventeen still require privity for an action under breach of implied warranty of merchantability for economic loss. Thirty-one states have abandoned the privity requirement. Rhode Island and Utah seem to have retained the privity requirement but there are no cases directly on point in either jurisdiction. Louisiana has not adopted the UCC.

EXHIBIT G

CHART OF JURISDICTIONS WHICH HAVE ADOPTED VERBATIM UCC ARTICLE 2-302

UCC ARTICLE 2-302
UNCONSCIONABLE CONTRACT OR CLAUSE

Section 1: If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Section 2: When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

JURISDICTION	UCC ARTICLE 2-302
Alabama	Ala. Code 7-2-302
Alaska	Alaska Stat. 45.02.302
Arizona	Ariz. Rev. Stat. Ann. 47-2302
Arkansas	Ark. Code Ann. 4-2-302
California	Adopted as Cal. Civ. Code 1670.5
Colorado	Colo. Rev. Stat. 4-2-302
Connecticut	Conn. Gen. Stat. 42a-2-302
Delaware	6 Del. Code Ann. 2-302
District of Columbia	D.C. Code Ann. 28:2-302
Florida	Fla. Stat. 672.302
Georgia	Ga. Code Ann. 11-2-302
Hawaii	Haw. Rev. Stat. 490:2-302
Idaho	Idaho Code 28-2-302
Illinois	810 Ill. Comp. Stat. Ann. 5/2-302
Indiana	Ind. Code Ann. 26-1-2-302
Iowa	Iowa Code Ann. 554.2302
Kansas	Kan. Stat. Ann. 84-2-302
Kentucky	Ky. Rev. Stat. Ann. 355.2-302

JURISDICTION	UCC ARTICLE 2-302
Louisiana	*Did Not Adopt*
Maine	11 Me. Rev. Stat. Ann. 2-302
Maryland	Md. Com. Law Code Ann. 2-302
Massachusetts	Mass. Ann. Laws ch. 106, 2-302
Michigan	Mich. Stat. Ann. 440.2302
Minnesota	Minn. Stat. 336.2-302
Mississippi	Miss. Code Ann. 75-2-302
Missouri	Mo. Rev. Stat. 400.2-302
Montana	Mont. Code Ann. 30-2-302
Nebraska	Neb. Rev. Stat. (U.C.C.) 2-302
Nevada	Nev. Rev. Stat. 104.2302
New Hampshire	N.H. Rev. Stat. Ann. 382-A:2-302
New Jersey	N.J. Stat. 12A:2-302
New Mexico	N.M. Stat. Ann. 55-2-302
New York	N.Y. U.C.C. Law 2-302
North Carolina	N.C. Gen. Stat. 25-2-302
North Dakota	N.D. Cent. Code 41-02-19 (2-302)
Ohio	Ohio Rev. Code Ann. 1302.15
Oklahoma	12A Okla. Stat. 2-302
Oregon	Or. Rev. Stat. 72.3020
Pennsylvania	13 Pa. Stat. Ann. 2302
Rhode Island	R.I. Gen. Laws 6A-2-302
South Carolina	S.C. Code Ann. 36-2-302
South Dakota	S.D. Codified Laws 57A-2-302
Tennessee	Tenn. Code Ann. 47-2-302
Texas	Tex. Bus. & Com. Code Ann. 2.302
Utah	Utah Code Ann. 70A-2-302

JURISDICTION	UCC ARTICLE 2-302
Vermont	9A Vt. Stat. Ann. 2-302
Virginia	Va. Code Ann. 8.2-302
Washington	Wash. Rev. Code 62A.2-302
West Virginia	W. Va. Code 46-2-302
Wisconsin	Wis. Stat. 402.302
Wyoming	Wyo. Stat. 34.1-2-302

EXHIBIT H

COMMON CHARACTERISTICS OF CONSUMER FRAUD LAWS OF 51 JURISDICTIONS

STATUTES THAT BROADLY PROHIBIT UNFAIR AND DECEPTIVE PRACTICES (Typically modeled after Federal Trade Commission Act, which provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1).)		STATUTES THAT ENUMERATE A "LAUNDRY LIST" OF PROHIBITED PRACTICES (Typically derive from the Commission on Uniform State Laws, and prohibit representing that goods have characteristics, uses, benefits, or qualities that they do not have, or that goods are of a particular standard, quality, or grade if they are of another (the "Standard Deceptive Practices").)	
Alabama[1]	New Jersey	Alabama	Nevada
Arizona	New Mexico	Alaska	New Hampshire
Arkansas	New York	Arkansas	Ohio
Connecticut	North Carolina	California	Oklahoma
Delaware	North Dakota	Colorado	Oregon
Florida	Oklahoma	District of Columbia	Pennsylvania
Georgia	Oregon	Georgia	Rhode Island
Hawaii	Rhode Island	Idaho	South Dakota
Idaho	South Carolina	Illinois	Tennessee
Iowa	Tennessee	Indiana	West Virginia
Kentucky	Texas	Iowa	Texas
Louisiana	Utah	Kansas	Utah
Maine	Vermont	Maryland	Virginia
Massachusetts	Virginia	Michigan	West Virginia
Missouri	Washington	Minnesota	Wisconsin
Montana	Wyoming	Mississippi	Wyoming
Nebraska			

[1]Several states (Alabama, Arkansas, Georgia, Idaho, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia and Wyoming) have adopted the substance of both the FTC Act and the Standard Deceptive Practices in their consumer fraud statutes.

CONSUMER FRAUD LAWS OF 51 JURISDICTIONS

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
AL	Standard Deceptive Practices laundry list of "deceptive acts or practices in the conduct of any trade or commerce" including, but not limited to: "[r]epresenting that goods or services have . . . characteristics, . . . uses, benefits, or qualities that they do not have"; "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another"; and "[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." [2/]	No.[3/]	No.[4/]	Actual damages, treble damages, equitable relief.[5/]
AK	Standard Deceptive Practices laundry list plus "using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services. . . ."[6/]	No.[7/]	No.[8/]	Actual damages, treble damages, equitable relief.[9/]

[2/] Ala. Code § 8-19-5(5), (7), (26).

"Representing that goods or services have . . . characteristics, . . . uses, benefits, or qualities that they do not have," and "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another," as well as provisions that are substantially analogous thereto, are referred to herein as the "Standard Deceptive Practices."

[3/] Id.; see Nunlev v. State, 628 So.2d 619 (Ala. 1993)

[4/] See ids.

[5/] Ala. Code. § 8-19-10(a); see also 8-19-10(a)(3) (availability of injunctive relief), 8-19-8(e) ("the court may grant such other appropriate relief as the court may determine.")

[6/] Alaska Stat. § 45.50.471(b)(4), (6), (12).

[7/] State v. O'Neill Investigation Inc., 609 P.2d 520 (Alaska 1980).

[8/] State v. O'Neill Investigation Inc., 609 P.2d 520 (Alaska 1980).

[9/] Alaska Stat. § 45.50.501; § 45.50.531(a) (triple actual damages or $500, "whichever is greater" and "[t]he Court may provide such other relief it considers necessary and proper."); see also 45.50.901(b) (allowing restitution).

BEST AVAIL

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
AZ	Blanket prohibition providing: "The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice."[10/]	No.[11/]	No.[12/]	Actual damages,[13/] punitive damages,[14/] equitable relief.[15/]
AR	Laundry list of "[d]eceptive and unconscionable trade practices," including "[e]ngaging in any . . . unconscionable, false, or deceptive act or practice in business, commerce, or trade."[16/]	Not in all instances.[17/]	No.[18/]	Actual damages, punitive damages, equitable relief.
CA	Standard Deceptive Practices laundry list of "unfair and deceptive business practices."[19/]	No.[20/]	No.[21/]	Actual damages, punitive damages, equitable relief, injunctive relief, restitution.[22]

[10/]Ariz. Rev. Stat. § 44-1522(A)

[11/]State ex rel. Corbin v. Tolleson, 773 P.2d 490, 503 (Ariz. App. 1989) (intent to deceive not required to find violation; intent to do the underlying act is sufficient).

[12/]Id. at 502 ("Reliance is not an element of consumer fraud."); but see Peery v. Hansen, 585 P.2d 574, 577 (Ariz. App. 1978) (reliance required under common law fraud).

[13/]Holeman v. Neils, 803 F. Supp. 237 (D. Ariz. 1992).

[14/]Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 666 P.2d 83 (Ariz. App. 1983)

[15/]Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119 (Ariz. 1974); Ariz. Rev. State. § 44-1528.

[16/]Ark. Code Ann. § 4-88-107(a).

[17/]Id.

[18/]Id.

[19/]Cal. Civ. Code §§ 1760, 1770(a)(5) & (7).

[20/]Cal. Civ. Code § 1170(a).

[21/]Id.

[22/]Cal. Civ. Code § 1780(a).

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State	Pertinent Deceptive Practices Prohibition	Requires Scienter?	Requires Intrastate Reliance?	Relief Available
CO	Standard Deceptive Practices laundry list plus "[f]ail[ing] to disclose material information concerning goods. . . ."[23]	Yes.[24]	No.[25]	Actual damages, treble damages, equitable relief.[26]
CT	Blanket prohibition providing: "No person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce."[27]	No.[28]	No.[29]	Actual damages, punitive damages, equitable relief.[30]
DE	Blanket prohibition providing: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact . . . in connection with the sale, lease or advertisement of any merchandise . . . is an unlawful practice."[31]	No.[32]	No.[33]	Actual damages, punitive damages, equitable relief[34]

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[23]Col. Rev. Stat. § 6-1-105(1)(e), (g) & (u).

[24]Col. Rev. Stat. § 6-1-105.

[25]See Col. Rev. Stat. 6-1-113(1).

[26]Col. Rev. Stat. 6-1-113; Witters v. Daniel Motors, Inc., 524 P.2d 632, 635 (Col. App. 1974) (all common law remedies are available for a CCPA violation); 6-1-110 (injunctive relief including restitution and preemption of "unjust enrichment").

[27]Conn. Gen. Stat. § 42-110b.

[28]Web Press Servs. Corp. v. New London Motors, Inc., 525 A.2d 57, 68 (Conn. 1987); Conn. Gen. Stat. § 42-110g(a).

[29]Hinchcliffe v. AMC, 440 A.2d 810, 815-16 (Conn. 1981); Conn. Gen. Stat. § 42-110g(a).

[30]Conn. Gen. Stat. § 42-110g(a) ("actual damages . . . the court may, in its discretion, award punitive damages, and may provide such equitable relief as it deems necessary or proper."); see also 42-110d(e) (restitution is available as equitable relief).

[31]6 Del. Code § 2513(a).

[32]Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983).

[33]Id.

[34]Id. at 1076; 6 Del. Code § 2523 (includes restitution).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
DC	Standard Deceptive Practices laundry list plus "misrepresent[ation] as to a material fact which has a tendency to mislead"; and "fail[ure] to state a material fact if such failure tends to mislead."[35]	????.[36]	No.[37]	Treble damages, punitive damages, equitable relief.[38]
FL	Blanket prohibition providing: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[39]	No.[40]	No.[41]	Actual damages, equitable relief, declaratory relief.[42]
GA	Blanket prohibition on "[u]nfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce," plus Standard Deceptive Practices laundry list.[43]	No.[44]	Yes.[45]	Actual damages, punitive damages, equitable relief.[46]

[35] See D.C. Code § 28-3904(a), (d), (e), (f).

[36] Osbourne v. Capital City Mortg. Corp., 727 A.2d 322, 325-26 (D.C. App. 1999) (clear and convincing evidence standard applies to claims of intentional misrepresentation under the CPPA)

[37] D.C. Code § 28-3904.

[38] D.C. Code § 28-3905(k)(1).

[39] Fla. Stat. § 501.204(1).

[40] See Fla. Stat. § 501.211.2

[41] Davis v. Powertel, Inc., 2000 Fla. App. LEXIS 16959 (Fla. App. 2000) (opinion not final until time expires to file motion for rehearing, and disposition thereof if filed).

[42] Fla. Stat. § 501.211.

[43] Ga. Stat. § 10-1-393(b)(5), (7).

[44] Ga. Stat. § 10-1-399(a).

[45] Lynas v. Williams, 454 S.E.2d 570, 574 (Ga. App. 1995).

[46] Ga. Stat. § 10-1-399(a).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
HI	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.[47]	No.[48]	No.[49]	Actual damages, treble damages, equitable relief[50]
ID	Standard Deceptive Practices laundry list plus "Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer"; and "Engaging in any unconscionable method, act or practice in the conduct of trade or commerce. . . ."[51]	No.[52]	No.[53]	Actual damages, punitive damages, equitable relief, injunctive relief, restitution.[54]
IL	Standard Deceptive Practices laundry list plus "engag[ing] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."[55]	No.[56]	No.[57]	Actual damages, punitive damages, equitable relief, injunctive relief.[58]

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[47] Haw. Rev. Stat. § 480-2.

[48] Davis v. Wholesale Motors, 949 P.2d 1026, 1038 (Haw. App. 1997) (listing elements of violation of HRS @ 480-13)

[49] Compare id.; Hawaii's Thousand Friends v. Anderson, 768 P.2d 1293, 1301 (Haw. 1989) (elements of fraud).

[50] Haw. Rev. Stat. § 480-13.

[51] Idaho Code § 48-603(5), (7), (17), (18); § 48-603c.

[52] State ex rel. Kidwell v. Master Distrib., Inc., 615 P.2d 116, 122-23 (Idaho 1980).

[53] Id.

[54] Idaho Code § 48-608.

[55] 815 ILCS § 510/2 (5), (7), (12)

[56] Smith v. Prime Cable of Chicago, 658 N.E.2d 1325, 1335 (Ill. App. 1995).

[57] 815 ILCS § 510/2.

[58] 815 ILCS 510/3 (providing for injunctive relief ". . . in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State.").

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
IN	Standard Deceptive Practices laundry list.[59]	No.[60]	Yes.[61]	Actual damages, equitable relief, restitution.[62]
IA	"The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise. . . ", including represent[ing] in connection with the lease, sale, or advertisement of any merchandise that [it] has certain performance characteristics, . . . uses, or benefits. . . " that it does not have.[63]	No.[64]	No.[65]	No private cause of action under statute.[66]
KS	Standard Deceptive Practices laundry list plus "use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact"; "failure to state a material fact, or the . . . concealment, suppression or omission of a material fact. . . ."[67]; and "any unconscionable act or practice in connection with a consumer transaction . . . . whether it occurs before, during or after the transaction."[68]	Yes.[69]	No[70]	Actual damages, injunctive relief, equitable relief, declaratory relief.[71]

[59] Ind. Code § 24-5-0.5-3(a)(1), (2)
[60] McKinney v. State, 693 N.E.2d 65, 67-69 (Ind. 1998).
[61] Ind. Code § 24-5-0.5.4(a).
[62] Ind. Code § 24-5-0.5-4.
[63] Iowa Code § 714.16.2(a).
[64] State v. Hydro Mfg., Ltd., 436 N.W.2d 617, 622 (Iowa 1989).
[65] Iowa Code § 714.16.2(a); State v. Hydro Mfg., Ltd., 436 N.W.2d 617, 622 (Iowa 1989).
[66] Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 228 (Iowa 1998).
[67] Kan. Stat. § 50-626(a), (b)(1), (b)(2), (b)(3).
[68] Kan. Stat. § 50-627.
[69] Porras v. Bell, 857 P.2d 676, 678 (Kan. App. 1993); Kan. Stat. § 50-627(b).
[70] Kan. Stat. § 50-626(b).
[71] Kan. Stat. § 50-634.

State	Common Deceptive Practices Prohibited	Reliance Necessary?	Requires Individual Reliance?	Relief Available
KY	Blanket prohibition providing: "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . . [U]nfair shall be construed to mean unconscionable."[72]	No.[73]	No.[74]	Actual damages, punitive damages, equitable relief.[75]
LA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[76]	No.[77]	No.[78]	Actual damages, treble damages, equitable relief.[79]
ME	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful."[80]	No.[81]	No.[82]	Actual damages, equitable relief (including restitution), injunctive relief.[83]

[72] Ky. Rev. Stat. § 367.170.

[73] Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287, 291 (Ky. 1991)

[74] Telcom Directories, Inc. v. Commonwealth, 833 S.W.2d 848, 850 (Ky. App. 1991)

[75] Ky. Rev. Stat. § 367.220(1).

[76] La. Rev. Stat. § 51:1405(A).

[77] See La. Rev. Stat. § 51:1409(A).

[78] See Core v. Martin, 543 So. 2d 619, 621 (La. App. 1989) (unlawful conduct need only "involve" fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct).

[79] La. Rev. Stat. § 51:1409(A) (actual and treble damages not available on class basis); La. Rev. Stat. § 51:1408 (equitable relief including restitution)

[80] 5 Me. Rev. Stat. § 207(1).

[81] Bartner v. Carter, 405 A.2d 194, 200 (Me. 1979).

[82] See Guiggev v. Bombardier, 615 A.2d 1169, 1172 (Me. 1992)

[83] 5 Me. Rev. Stat. § 213(1).

State	Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MD	Standard Deceptive Practices laundry list plus any "[f]alse . . . or misleading oral or written statement . . . or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers"; "[f]ailure to state a material fact if the failure deceives or tends to deceive"; and "[d]eception, fraud, . . . misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with . . . [t]he promotion or sale of any consumer goods"[84]	No.[85]	No.[86]	Actual damages, equitable relief (including restitution), injunctive relief.[87]
MA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[88]	No.[89]	No.[90]	Actual damages, treble damages, equitable relief, , injunctive relief.[91]
MI	Standard Deceptive Practices laundry list plus "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer"; and "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner."[92]	No.[93]	No.[94]	Actual damages, equitable relief, injunctive relief, restitution, declaratory relief.[95]

[84] Md. Com. Law Code § 13-301(1), (2)(i) & (iv), (3), 9(i).
[85] Md. Com. Law Code § 13-301(1)-(3); but see Md. Com. Law Code § 13-301(9).
[86] Md. Com. Law Code § 13-301(1)-(3).
[87] Md. Com. Law Code § § 13-408(a); § 13-406(c).
[88] Mass. Gen. L. Ch. 93A, § 2.
[89] Giannasca v. Everett Aluminum, Inc., 431 N.E.2d 596, 599 (Mass. App. 1982).
[90] Fraser Eng'g Co. v. Desmond, 524 N.E.2d 110, 113 (Mass. App. 1988).
[91] Mass. Gen. L. Ch. 93A, § 9.
[92] Mich. Stat. § 445.903(1)(c), (e), (s), (cc).
[93] See Mich. Stat. § 445.911(6).
[94] Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987).
[95] Mich. Stat. § 445.911 (1), (3), (4).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MN	Standard Deceptive Practices laundry list plus "engag[ing] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."[96]	No.[97]	No.[98]	Actual damages, equitable relief, injunctive relief, restitution.[99]
MS	Standard Deceptive Practices laundry list.[100]	No.[101]	No.[102]	Actual damages, equitable relief (including restitution)[103]
MO	Blanket prohibition providing: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is declared to be an unlawful practice."[104]	No.[105]	No.[106]	Actual damages, punitive damages, equitable relief.[107]

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[96]Minn. Stat. § 325D.44 (5), (7), (13).

[97]Minn. Stat. § 325D.45(1).

[98]Id.

[99]Minn. Stat. § 325D.45(1) (injunctive relief), (3) (in addition to other remedies available against same conduct); see cmts. & annotations following § 32D.45.

[100]Miss. Code § 75-24-5(1), (2)(e) & (g).

[101]See Miss. Code § 75-24-19(1)(b), (3).

[102]See Southwest Starving Artists Group, Inc. v. State, 364 So.2d 1128, 1130-31 (Miss. 1978).

[103]Miss. Code § 75-24-15(1) (actual damages in addition to all other statutory and common law remedies (but see Miss. Code § 75-24-15(4) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person."); Miss. Code § 75-24-11 (equitable relief, restitution).

[104]Vernon's Missouri Stat. § 407.020(1).

[105]State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635-36 (Mo. App. 1988).

[106]Id.

[107]Vernon's Missouri Stat. § 407.025(1).

State	Restricts Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
MT	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."[108]	No.[109]	No.[110]	Actual damages, treble damages, equitable relief,[111] restitution.[112]
NE	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."[113]	No.[114]	No.[115]	Actual damages, punitive damages, injunctive relief, restitution.[116]
NV	Standard Deceptive Practices laundry list plus "mak[ing] any other false representation in a transaction"; and "[f]ail[ing] to disclose a material fact in connection with the sale or lease of goods. . . ."[117]	No.[118]	No.	Actual damages, equitable relief, restitution[119]

[108] Mont. Code § 30-14-103.

[109] See Darvial v. T&W Chevrolet, 641 P.2d 1368, 1371 (Mont. 1982).

[110] Id. at 1371-72.

[111] Mont. Code § 30-14-133(1) (provides for individual actions only).

[112] Mont. Code § 30-14-131.

[113] Neb. Rev. Stat. § 59-1602.

[114] See Cao v. Huan Nguyen, 607 N.W.2d 528 (Neb. 2000)

[115] Id.

[116] Neb. Rev. Stat. 59-1609 (injunctive relief, actual damages, punitive damages not to exceed $1,000); § 59-1608 (court may order restitution of anything acquired by fraudulent acts).

[117] Nev. Rev. Stat. § 598.0915(5), (7), (14); § 598.0923(2).

[118] See Nev. Rev. Stat. § 598.0979(1) (knowledge, not intent, required as element of a deceptive trade practice).

[119] Nev. Rev. Stat. § 41.600 (actual damages); Nev. Rev. Stat. § 598.0993 (equity/restitution).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
NH	Standard Deceptive Practices laundry list.[120]	No.[121]	No.[122]	Actual damages, double damages, treble damages, equitable relief, injunctive relief.[123]
NJ	Blanket prohibition providing: "The act, use or employment . . . of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice . . . ."[124]	No.[125]	No.[126]	Actual damages, treble damages, equitable relief.[127]
NM	Blanket prohibition providing: "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful."[128]	No.[129]	No.[130]	Actual damages, treble damages, equitable relief, injunctive relief.[131]

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[120] N.H. Rev. Stat. § 358-A:2(V), (VII).

[121] See N.H. Rev. Stat. § 358-A:10(I).

[122] See Barrows v. Boles, 687 A.2d 979, 986 (N.H. 1996).

[123] N.H. Rev. Stat. § 358-A:10(I); § 358-A:10-a.

[124] N.J. Rev. Stat. § 56:8-2.

[125] But see Fenwick v. Kay Am. Jeep, Inc., 371 A.2d 13 (N.J. 1977) (intent required only where claim based purely on a concealment, suppression, or omission of material fact).

[126] N.J. Rev. Stat. § 56:8-2.

[127] N.J. Rev. Stat. § 56:8-19.

[128] N.M. Stat. § 57-12-3.

[129] N.M. Stat. § 57-12-10A.

[130] See id.

[131] N.M. Stat. § 57-12-10(A), (B) (but only class representative in class action entitled to treble damages).

BEST AVAIL

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
NY	Blanket prohibition providing: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."[132]	No.[133]	No.[134]	Actual damages, treble damages, equitable relief.[135]
NC	Blanket prohibition providing: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[136]	No.[137]	No.[138]	Actual damages, treble damages.[139]
ND	Blanket prohibition providing: "The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice."[140]	No.[141]	No.[142]	Actual damages, treble damages.[143]

[132] N.Y. Gen. Bus. Law § 349(a).
[133] Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 897 (N.Y. 1999).
[134] Stutman v. Chemical Bank, 731 N.E.2d 608, 612 (N.Y. 2000)
[135] N.Y. Gen. Bus. Law § 349(h).
[136] N.C. Gen. Stat. § 75-1.1(a).
[137] Tomlinson v. Camel City Motors, 408 S.E.2d 853, 858 (N.C. 1991).
[138] Earce v. Am. Defender Life Ins. Co., 343 S.E.2d 174, 180 (N.C.1986).
[139] N.C. Gen. Stat. § 75-16 (any damages assessed shall be trebled).
[140] N.D. Cent. Code § 51-15-02.
[141] See N.D. Cent. Code § 51-15-09.
[142] N.D. Cent. Code § 51-15-02.
[143] N.D. Cent. Code § 51-15-09.

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State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Industrial Reliance?	Relief Available
OH	Standard Deceptive Practices laundry list.[144]	No.[145]	No.[146]	Actual damages, equitable relief, injunctive relief, rescission, declaratory relief.[147]
OK	Blanket prohibition of unfair or deceptive trade practices, plus Standard Deceptive Practices laundry list.[148]	No.[149]	No.[150]	Actual damages.[151]
OR	Standard Deceptive Practices laundry list plus "[c]oncurrent with tender or delivery of any . . . goods . . . fail[ing] to disclose any known material defect"; and "[e]ngag[ing] in any other unfair or deceptive conduct in trade or commerce."[152]	No.[153]	No.[154]	Actual damages, punitive damages, equitable relief, injunctive relief.[155]

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[144] Ohio Rev. Code § 1345.02(A), (B)(1), (B)(2).

[145] See Ohio Rev. Code § 1345.09(F)(2).

[146] See Ohio Rev. Code § 1345.09(D).

[147] Ohio Rev. Code § 1345.09(A), (B), (D).

[148] 15 Okla. Stat. §§ 752(11), (12); 753(5), (7), (20).

[149] Patterson v. Beall, 2000 WL 1707795, *5 (Okla. Nov. 14, 2000) (listing elements of violation) (subject to revision or withdrawal prior to publication in permanent law reports).

[150] 15 Okla. Stat. § 752(11).

[151] 15 Okla. Stat. §§ 761.1(A) (statutory penalties for unconscionable practices available in individual actions only under § 761.1(B)).

[152] Or. Rev. Stat. § 646.608(1)(e), (g), (t), (u); see § 646.608(2) ("A representation under subsection (1) . . . may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.")

[153] Or. Rev. Stat. § 646.638(1); Luedeman v. Tri-west Constr. Co., 592 P.2d 281, 282-83 (Or. App. 1979) (proof of willfulness (*i.e.*, knew/should have known of violation) required for damages under § 646.638.1).

[154] Or. Rev. Stat. § 646.608(3); Raudebaugh v. Action Pest Control, Inc., 650 P.2d 1006, 1009 (Or. App. .982).

[155] Or. Rev. Stat. § § 646.632 (injunctive relief); 646.636 (restitution/equitable relief); 646.638(1) (actual and punitive damages/equitable relief)

State	Formation: Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
PA	Standard Deceptive Practices laundry list plus "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."[156]	No.[157]	No.[158]	Actual damages, treble damages, equitable relief.[159]
RI	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"; plus Standard Deceptive Practices laundry list plus "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding"; "[e]ngaging in any act or practice which is unfair or deceptive to the consumer"; and "[u]sing any other methods, acts or practices which mislead or deceive members of the public in a material respect"[160]	No.[161]	No.[162]	Actual damages, punitive damages, equitable relief.[163]
SC	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[164]	No.[165]	No.[166]	Actual damages, treble damages, equitable relief.[167]

[156] 73 Pa. Stat. §§ 201-3; 201-2(4)(v), (vii), (xxi).

[157] But see Prime Meats v. Yochim, 619 A.2d 769, 773 (Pa. Super. 1993) ("to recover under . . . § 201-2(4)(xvii), the elements of common law fraud [including scienter] must be proven").

[158] But see Dilucido v. Terminix Int'l. Inc., 676 A.2d 1237, 1240-41 (Pa. Super. 1996) (to recover for ascertainable losses under. § 201-9.2, plaintiff must "establish[] a causal connection to or reliance on" alleged deceptive conduct); Prime Meats v. Yochim, 619 A.2d 769, 773 (Pa. Super. 1993) ("to recover under . . . § 201-2(4)(xvii), the elements of common law fraud [including reliance] must be proven").

[159] 73 Penn. Stat. § 201-9.2(a).

[160] R.I. Gen. Laws §§ 6-13.1-2; 6-13.1-1(5)(E), (G), (L), (M), (N).

[161] See R.I. Gen. Laws §§ 6-13.1-1; 6-13.1-5.2 (no scienter/intent element).

[162] See ids. (no reliance element).

[163] R.I. Gen. Laws. § 6-13.1-5.2.

[164] S.C. Code § 39-5-20(a)

[165] State ex rel. McLeod v. C & L Corp., 313 S.E.2d 334, 338 (S.C. App. 1984)

[166] Id.; see also, deBondt v. Carlton Motorcars, Inc., 536 S.E.2d 399, 407-08 (S.C. App. 2000)

[167] S.C. Code § 39-5-104(a) (precludes class-wide recovery of actual/treble damages).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Detrimental Reliance	Relief Available
SD	Laundry list of deceptive acts and practices including: to "[k]nowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise. . . ."[168]	Yes.[169]	No.[170]	Actual damages, equitable relief, restitution.[171]
TN	Blanket prohibition on unfair or deceptive acts or practices, including the Standard Deceptive Practices.[172]	No.[173]	No.[174]	Actual damages, treble damages, equitable relief, declaratory relief.[175]
TX	Blanket prohibition providing: "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"; plus Standard Deceptive Practices laundry list plus "the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed"[176]	No.[177]	Yes.[178]	Actual damages, treble damages, equitable relief, injunctive relief, restitution.[179]

[168] S.D. Code Laws § 37-24-6(1)

[169] Id.

[170] Id.

[171] S.D. Code Laws § 37-24-31; see also § 37-24-29 (restitution/equitable relief).

[172] Tenn. Code Ann. § 47-18-104(a), (b)(5), (7), (23).

[173] See Smith v. Scott Lewis Chevrolet, 843 S.W.2d 9, 12 (Tenn. App. 1992); Tenn. Code Ann. § 47-18-109(a)(3), (a)(4)(D).

[174] Harvey v. Ford Motor Credit Co., 1999 Tenn. App. LEXIS 448, *4 (Tenn. App. July 13, 1999); Lien v. Couch, 993 S.W.2d 53, 57 (Tenn. App. 1998) (recognizing consumer protection statutes ordinarily dispense with reliance requirement); see Tenn. Code Ann. § 47-18-109.

[175] Tenn. Code Ann. § 47-18-109.

[176] Tex. Bus. & Com. Code § 17.46(a), (b)(5) & (7).

[177] See Tex. Bus. & Com. Code § 17.50(b)(1).

[178] Tex. Bus. & Com. Code § 17.50(a)(1)(B).

[179] Tex. Bus. & Com. Code § 17.50(b).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter	Requires Individual Reliance	Relief Available
UT	Blanket prohibition on deceptive acts or practices in connection with consumer transactions, plus Standard Deceptive Practices laundry list.[180]	Yes.[181]	No.[182]	Actual damages, equitable relief, injunctive relief, declaratory relief.[183]
VT	Blanket prohibition providing: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."[184]	No.[185]	Yes.[186]	Actual damages (including purchase price), punitive damages.[187]
VA	Standard Deceptive Practices laundry list plus "[a]dvertising or offering for sale goods which are . . . defective . . . without clearly and unequivocally indicating . . . that the goods are . . .defective"; and "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction". [188]	No.[189]	No.[190]	Actual damages, treble damages, equitable relief, restitution.[191]

[180] Utah Code § 13-11-4(1), (2)(a) & (b).
[181] Utah Code § 13-11-4(2); Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991).
[182] See Utah Code § 13-11-19(1)(b).
[183] Utah Code § 13-11-19.
[184] 9 Vt. Stat. § 2453(a).
[185] Poulin v. Ford Motor Co., 513 A.2d 1168, 1172 (Vt. 1986).
[186] 9 Vt. Stat. § 2461(b); Russell v. Atkins, 679 A.2d 333, 335 (Vt. 1996).
[187] 9 Vt. Stat. § 2461(b) (treble damages limited to three times purchase price).
[188] Va. Code § 59.1-200(A)(5)-(7), (14).
[189] See Va. Code § 59.1-204(A)
[190] Lambert v. Downtown Garage, Inc., 44 Va. Cir. 102, 104-05 (Va. Cir. Ct. 1997)
[191] Va. Code. §§ 59.1-204 (actual, treble damages); 59.1-205 (restitution and other equitable relief).

State	Pertinent Deceptive Practices Prohibited	Requires Scienter?	Requires Individual Reliance?	Relief Available
WA	Blanket prohibition providing: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[192]	No.[193]	No.[194]	Actual damages, treble damages, injunctive relief.[195]
WV	Standard Deceptive Practices laundry list plus "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding"; and "[t]he act, use or employment . . . of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission . . . ".[196]	No.[197]	No.[198]	Actual damages, equitable relief.[199]
WI	Advertisements, announcements, statements or representations containing any assertion, representation or statement of fact which is untrue, deceptive or misleading.[200]	Yes.[201]	No.[202]	Actual damages, equitable relief.[203]
WY	Laundry list of deceptive trade practices, including: "[r]epresent[ing] that merchandise is of a particular standard [or] grade . . . if it is not"; and "[e]ngag[ing] in unfair or deceptive acts or practices."[204]	No.[205]	Yes.[206]	Actual damages, equitable relief.[207]

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[192] Wash. Rev. Code § 19.86.020.
[193] Tradewell Stores, Inc. v. T.B. & M., Inc., 500 P.2d 1290,1296 (Wash. App. 1972)
[194] See generally, Morris v. Int'l Yogurt Co., 729 P.2d 33 (Wash. 1986).
[195] Wash. Rev. Code § 19.86.090.
[196] W. Va. Code §§ 46A-6-102(f)(5), (7), (12), (13); 46A-6-104.
[197] See ids.
[198] See W. Va. Code §§ 46A-6-102(f)(13; 46A-6-106(1).
[199] W. Va. Code § 46A-6-106(1) (consumer may recover damages or $200, whichever is greater).
[200] Wis. Stats. § 100.18(1).
[201] HBN Partnership v. Schappe, 532 N.W.2d 144 (Wis. App. 1995)
[202] Tim Torres Enters. Inc. v. Linscott, 416 N.W.2d 670, 676 (Wis. App. 1987).
[203] Wis. Stat. § 100.18(11).
[204] Wyo. Stat. § 40-12-105(a)(iii), (xv).
[205] See Wyo. Stat. § 40-12-105.
[206] Wyo. Stat. § 40-12-108(a).
[207] Wyo. Stat. §§ 40-12-108 (actual damages); 40-12-106 (equitable relief including restitution).